

DOCKET

No. 86-935-ASX
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Title: Regents of the University of California, Appellant
v.
Public Employment Relations Board, et al.

Docketed:
December 8, 1986

Court: Court of Appeal of California,
First Appellate District

Counsel for appellant: Odle, James N.

Counsel for appellee: Biren, Andrea L., Sinclair Jr., Andrew
T.

Entry	Date	Note	Proceedings and Orders
1	Dec 8 1986	G	Statement as to jurisdiction filed.
3	Dec 16 1986		Order extending time to file response to jurisdictional statement until February 6, 1987.
4	Feb 5 1987		Lodging received. (2 boxes).
5	Feb 5 1987		Motion of appellee CA Public Employment Relations Board to dismiss or affirm filed.
6	Feb 11 1987		DISTRIBUTED. February 27, 1987
7	Feb 13 1987	X	Reply brief of appellant Regents of the Univ. of CA filed.
8	Mar 2 1987	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
9	May 29 1987	X	Brief amicus curiae of United States filed.
10	Jun 2 1987		REDISTRIBUTED. June 18, 1987
11	Jun 22 1987		PROBABLE JURISDICTION NOTED. *****
13	Jul 3 1987		Order extending time to file brief of appellant on the merits until August 29, 1987.
14	Jul 17 1987	G	Motion of appellant to dispense with printing the joint appendix filed.
15	Aug 6 1987		Record filed.
16	Aug 26 1987		Motion of appellant to dispense with printing the joint appendix GRANTED.
18	Aug 27 1987		Order extending time to file brief of appellee on the merits until October 21, 1987.
19	Aug 28 1987		Brief of appellant Regents of the Univ. of CA filed.
20	Aug 29 1987		Brief amicus curiae of United States filed.
21	Sep 4 1987	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
22	Oct 5 1987		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
23	Oct 19 1987		Record filed.
24	Oct 21 1987		Brief amicus curiae of American Fed. of State, County and Municipal Employees filed.
25	Oct 21 1987		Brief amicus curiae of California Faculty Assn. filed.
26	Oct 21 1987	G	Motion of National Education Association, et al. for leave to file a brief as amici curiae filed.
27	Oct 21 1987		Brief of appellee William H. Wilson filed.
28	Oct 21 1987		Brief of appellee California Employment Relations Board

Entry	Date	Note	Proceedings and Orders

			filed.
29	Oct 21 1987	Brief amicus curiae of American Federation of Teachers	
		filed.	
30	Oct 29 1987	Opposition of Public Employment Relations Bd. to motion of	
		Natl. Education Assn., et al. for leave to file a brief	
		as amici curiae filed.	
31	Nov 9 1987	Motion of National Education Association, et al. for	
		leave to file a brief as amici curiae GRANTED.	
32	Nov 20 1987	CIRCULATED.	
33	Nov 23 1987	SET FOR ARGUMENT. Tuesday, January 12, 1988. (4th case).	
34	Dec 21 1987	X Reply brief of appellant Regents of the Univ. of CA filed.	
35	Jan 12 1988	ARGUED.	

JURISDICTIONAL

STATEMENT

No.

86-935

Supreme Court, U.S.

FILED

DEC 8 1986

JOSEPH F. SPANIOL, JR.,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Appellee,

and

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 371, and WILLIAM H. WILSON,
PRESIDENT, LOCAL 371,
Appellees.

**On Appeal from the Court of Appeal
of the State of California,
First Appellate District**

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

The question presented in this appeal is whether the federal Private Express statutes and the regulations implementing them prohibit the University from carrying out the order of the California Court of Appeal that the University must deliver, through its internal mail system, letters from a labor union to University employees when those letters do not bear United States postage.

PARTIES BELOW

In addition to the parties contained in the caption of the case in this Court, the United States Postal Service participated as *amicus curiae* in support of appellant before the California Court of Appeal.

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No. _____

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PRESIDENT, LOCAL 371,
Appellees.

**On Appeal from the Court of Appeal
of the State of California,
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the California Court of Appeal, First Appellate District, is reported at 182 Cal. App. 3d 71, 227 Cal. Rptr. 57 (1986), and is reprinted in the Appendix to this Jurisdictional Statement at Appendix 1, A-1 (App.). The earlier opinion by the same court in this case is reported at 139 Cal. App. 3d 1037, 189 Cal. Rptr. 298 (1983), and is reprinted at App. 7, A-58. Administrative decisions below by the Public Employment Relations Board (PERB) are not officially reported but appear in the Public

Employee Reporter, California Edition (PERC) (Labor Relations Press). The final PERB decision in this case appears at 8 PERC ¶ 15196 and is reprinted at App. 4, A-14. PERB's decision remanding the case for further factual findings appears at 7 PERC ¶ 14103 and is reprinted at App. 6, A-56. The Administrative Law Judge's findings were not reported and are reproduced at App. 5, A-48. The first decision by PERB as well as the hearing officer's proposed decision appear at 6 PERC ¶ 13003 and are reprinted at App. 10, A-76, and App. 11, A-81.

JURISDICTION

The Supreme Court of California denied appellant's Petition for Hearing on September 10, 1986. App. 3, A-13. The cause was returned to the California Court of Appeal by Remittitur on September 11, 1986, App. 2, A-12, and the Court of Appeal's judgment became final on that date. The University filed a timely notice of appeal in that court on November 12, 1986. App. 12, A-95. This appeal is being docketed with this Court within 90 days from the date the Supreme Court of California denied appellant's petition.

The jurisdiction of this Court is conferred by 28 U.S.C. § 1257(2). The judgment rendered by the highest court in which the decision could be had sustains the validity of a state statute interpreted to require delivery of unstamped mail in the University's internal mail system notwithstanding the University's contention that the statute as construed conflicts with the laws of the United States and places the University in the position of violating those laws.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves the following federal and state laws and regulations:

18 U.S.C. § 1694 (1982) provides as follows:

Whoever, having charge or control of any conveyance operating by land, air, or water, which regularly per-

forms trips at stated periods on any post route, or from one place to another between which the mail is regularly carried, carries, otherwise than in the mail, any letters or packets, except such as relate to some part of the cargo of such conveyance, or to the current business of the carrier, or to some article carried at the same time by the same conveyance, shall, except as otherwise provided by law, be fined not more than \$50.

39 C.F.R. § 310.3(b)(1) (1986):

Letters of the carrier. (1) The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the individual actually carrying the letters is not the person sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person (see § 310.3(b)(2)) and the letters must relate to the current business of such person.

Cal. Gov't Code § 3568 (West 1978):

Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act.

The foregoing sections, the relevant United States Postal Service statutes and regulations, and other relevant sections of the Higher Education Employer-Employee Relations Act (Cal. Gov't Code §§ 3560-3599 (West 1978)) (HEERA) are set forth at Apps. 16-20, A-100-A-115.

STATEMENT OF THE CASE

1. Background.

In 1979, appellees William H. Wilson and Local 371 of the American Federation of State, County and Municipal Employees

(AFSCME) filed an unfair practice charge against appellant, The Regents of the University of California (University), before the California Public Employment Relations Board (PERB), also appellee here, asserting that the University's refusal to permit the union to send union letters¹ to the University's custodial employees through the University's internal mail delivery system violated their right of access to employers' "means of communication" guaranteed to unions and employees under the California Higher Education Employer-Employee Relations Act² (HEERA), App. 20, A-115. Cal. Gov't Code §§ 3560-3599. Because the University's internal mail system crosses United States postal routes, in order to conform to the requirements of federal law, it must qualify for an exception to the Private Express statutes, which generally forbid the private carriage of letters. The exception under which the University system operates is known as the Letters of the Carrier exception.

This case arose at the University's Berkeley campus, and the record describes in some detail the operation of the internal mail delivery system at that campus. Outgoing mail originating at the

¹ It was stipulated that the union would use the University mail system to send the following types of materials:

1. general notices of union activities, including meetings, meet and confer sessions, and other concerted activities;
2. union publications, including newsletters, having to do with union-related activities;
3. materials concerning Local 371's position on the benefits of collective bargaining and the rights of employees protected under collective bargaining laws, including union-related election materials, information, and advice;
4. general notices of changes or modifications in University rules, regulations, and benefits affecting members of Local 371; and
5. other materials generally concerned with the business of Local 371 and the members thereof.

² The description of the factual background of this case closely paraphrases the description set forth in the first opinion of the California Court of Appeal, App. 7, A-58, and repeated by the Court of Appeal in its second decision in this case, App. 1, A-1.

campus is collected from many campus mail depositories by University employees, and is then taken by those employees to a central sorting operation. There the mail is separated into three groups: (1) mail already bearing United States postage; (2) unstamped internal University mail for Northern California; and (3) other unstamped mail. The prestamped mail is delivered immediately to the United States Postal Service (USPS) without further handling by the University. Internal University mail is monitored to ensure that only official University business is involved. Non-posted mail, delivery of which is not prohibited by the Private Express statutes, is then sorted and delivered by University employees to Northern California University locations. Other unstamped mail is rated and affixed with United States postage and delivered to the USPS. Senders of this third group of mail are charged by the University mail operation for postage affixed.

Mail coming into the University from the USPS is handled in one of two ways: mail addressed to any one of some fifty sites on the Berkeley campus is delivered to the site by the USPS. Other United States mail, not so addressed, is delivered to its University destination by University employees.

In summary, the only mail accepted for delivery within the University's internal mail system is either mail bearing United States postage or official University mail exempted from the Private Express statutes. The University long ago adopted regulations denying use of its internal mail system to non-University organizations or for political, commercial, or social purposes. Under these regulations, unions are prohibited from using the University's internal mail system. It is that prohibition which gave rise to the union's unfair practice charge.

The University responded to the unfair practice charge by arguing, *inter alia*, that it was prohibited by the Private Express statutes from delivering unstamped union mail through the University's internal mail system. In 1980, a PERB Hearing Officer found that the University's refusal to deliver unstamped union mail violated HEERA and that the question of the effect of the Private Express statutes could not be considered by PERB in the course of resolving an unfair practice charge brought under

HEERA. Pursuant to HEERA and the regulations of PERB implementing HEERA, the University took exception to the Hearing Officer's decision. PERB ruled on the University's exceptions in Decision No. 183-H, App. 10, A-76, on November 25, 1981, and ordered the University to grant the union access to the internal mail system without payment of postage. PERB declined to consider whether its order violated the Private Express statutes.

On July 2, 1982, the USPS issued an opinion advising the University that the carriage ordered by PERB would violate the Private Express statutes. Advisory Op., PES 82-9, App. 9, A-66.

The University petitioned the California Court of Appeal for a Writ of Review, which was issued on September 15, 1982. On February 17, 1983, the California Court of Appeal remanded the case to PERB for findings on the issue whether the University's regulations denying union access to its internal mail system without payment of postage were reasonable in light of all the surrounding circumstances, including the Private Express statutes and implementing regulations. The California Court of Appeal explicitly found that PERB was free to consider federal law in order to determine whether HEERA could be enforced without offending federal postal regulations. *Regents of the University of California v. Public Employment Relations Board*, 139 Cal. App. 3d 1037, 1042 n.5, App. 7, A-58.

On October 18, 1984, PERB issued Decision No. 420-H, App. 4, A-14, again finding that the University must permit unions to use its internal mail system without payment of postage. Contrary to the opinion expressed by the USPS, PERB found that free carriage of union mail by the University was exempted from the prohibitions of the Private Express statutes by an exception for Letters of the Carrier, 18 U.S.C. § 1694, App. 16, A-100, 39 C.F.R. § 310.3(b), App. 18, A-110, and by a second exception for letters delivered by Private Hands Without Compensation, 18 U.S.C. § 1696(c), App. 16, A-101 and 39 C.F.R. § 310.3(c), App. 18, A-110, and by a suspension for letters of bona fide student and faculty organizations, 39 C.F.R. § 320.4, App. 19, A-114.

The University again sought and obtained review in the California Court of Appeal. A brief was filed by the United States Postal Service as *amicus curiae*, urging reversal of PERB's order. On June 9, 1986, the Court of Appeal issued its second decision in the case, this time affirming PERB's order. The Court of Appeal found that delivery of unstamped union mail through the University's internal mail system did not violate the Private Express statutes because it fell within the Letters of the Carrier exception. App. 1, A-6. The Court of Appeal therefore did not rule on PERB's other contentions.³

On July 21, 1986, the University petitioned the California Supreme Court for a Writ of Review. The University's petition

³ PERB argued in the Court of Appeal in support of each of its findings, including the application of the Private Hands Without Compensation exception and the Suspension for Bona Fide Student and Faculty Organizations. The University argued that the Private Hands Without Compensation exception did not apply, because where the same entity that has allegedly ordered the carriage (the California Legislature) also funds it (through the Legislature's annual appropriation to the University), it seems disingenuous indeed to conclude that the carriage is uncompensated. Such reasoning, appellant argued, would permit a state to establish its own postal service for delivery of mail throughout the state on the theory that such carriage was private and uncompensated.

In finding, and arguing before the Court of Appeal, that the Suspension for Bona Fide Student and Faculty Organizations applied, PERB did not conclude that the union was either a student or a faculty organization. Rather, PERB argued that if the suspension were applied to faculty unions and not to non-faculty unions, it would violate the Fourteenth Amendment of the United States Constitution. Accordingly, PERB concluded that it must apply to all unions. In response, the United States Postal Service, as *amicus curiae*, noted that the suspension has not been interpreted by the Postal Service to apply to faculty unions. Moreover, as the University argued, *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), recognizes that public property, such as the University's internal mail system, "which is not by tradition or designation a forum for public communication" is property which the state "has power to preserve . . . under its control for the use to which it is lawfully dedicated."

was denied on September 10, 1986. App. 3, A-13. The decision of the California Court of Appeal became final on September 11, 1986. App. 2, A-12.

The decision of the Court of Appeal is directly contrary to the Advisory Opinion of the United States Postal Service. On September 25, 1986, Louis A. Cox, General Counsel of the United States Postal Service, wrote to the University advising that the decision of the California Court of Appeal is "detrimental to significant federal interests" and "misinterprets federal law which it is the responsibility of the United States Postal Service to enforce." App. 13, A-96. The letter went on to caution the University that the Advisory Opinion issued by the USPS (No. 82-9) was still in effect and that the University "may not lawfully carry the letters of organizations of the University's employees to those employees under the circumstances involved in this litigation, without the payment of postage on those letters as though they were carried by the United States Postal Service." The letter concluded that should the University attempt such carriage, the University and the senders of the letters would be subject to the civil and criminal penalties provided by federal law for violations⁴ and would also be subject to liability in accordance with 39 C.F.R. § 310.5, for the postage that would have been paid had those letters been sent through the United States mail. App. 13, A-97.

The University is thus caught between the order of the California Court of Appeal (which the California Supreme Court has declined to review) and the opinion of the United States Postal Service (which the University believes to be accurate) that the carriage ordered by the California Court of Appeal violates federal law and will subject the University to civil and criminal prosecution.

⁴ 18 U.S.C. § 1693, provides: "Whoever, being concerned in carrying the mail, collects, receives, or carries any letter or packet, contrary to law, shall be fined not more than \$50 or imprisoned not more than thirty days, or both."

2. How the Federal Question Was Presented.

The first document produced by the University in this case was its Answer to the unfair practice charge. In that Answer the University raised the following affirmative defense, "Respondent is prohibited by law from engaging in conduct competitive with the United States Postal Service." Thereafter, the University raised the federal question presented here in its brief to the Administrative Law Judge who heard the case; its first brief to the Public Employment Relations Board; its first petition and brief to the California Court of Appeal; its brief to the Public Employment Relations Board on rehearing; its petition and brief to the Court of Appeal on review of PERB's second decision; and its Petition for Writ of Review to the California Supreme Court.

THE QUESTIONS ARE SUBSTANTIAL

1. The Court Should Resolve the Question, Expressly Left Open in *Perry*, Whether the Delivery of a Union's Unstamped Mail in a School's Mail Delivery System Violates the Private Express Statutes.

The question whether the Private Express statutes prohibit an educational institution from carrying across postal routes unstamped mail sent from a union to employees of the institution was expressly left open by this Court in *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 39 n.1 (1983). The dispute in *Perry* began with a collective bargaining agreement between the Perry Township Board of Education and a union representing some school employees. The agreement provided that the representing union would have access to the school's internal mail system, but that no other union would have such access. The issue in *Perry* was whether denying a rival union access to the school's internal mail system violated the First and Fourteenth Amendments, but the issue on which the University seeks review in the instant appeal was implicit in *Perry*. This Court, however, decided that it was not appropriate to rule on that issue in deciding the *Perry* case:

The United States Postal Service, in a submission as amicus curiae, suggests that the interschool delivery of

material to teachers at various schools in the District violates the Private Express statutes, 18 USC §§ 1693-1699 and 39 USC §§ 601-606, which generally prohibit the carriage of letters over postal routes without payment of postage. We agree with the Postal Service that this question does not directly bear on the issues before the Court in this case. Accordingly, we express no opinion on whether the mail delivery practices involved here comply with the Private Express statutes or other Postal Service regulations.

460 U.S. at 39 n.1.

Even so, the California Court of Appeal relied on *Perry* in holding that the carriage of mail it ordered the University to undertake did not violate the Private Express statutes. App. 1, A-10-11. Although *Perry* is discussed below, it is significant in one respect that should be noted here: *Perry* provides strong and recent evidence of the significance of the issue on which the University seeks review. The issue raised in this appeal was briefed by the United States Postal Service as *amicus curiae* in *Perry*. Had the issue been ripe for decision, it could well have determined the outcome of the case. Furthermore, this Court noted in *Perry* a substantial number of lower court decisions concerning constitutional objections to school district policies granting access by unions to school district mail systems. 460 U.S. at 43 n.6. These decisions confirm that the practice of allowing unions access to the internal mail delivery systems of public educational institutions is widespread. If, as the United States Postal Service and the University contend, the carriage of mail ordered by the California Court of Appeal is prohibited by the Private Express statutes, it is likely that the access to mail systems at issue in each of the cases cited in footnote 6 of the *Perry* decision, and many similar access policies which have not been the subject of litigation, violate the Private Express statutes.

2. The Letters of the Carrier Exception to the Private Express Statutes Does Not Permit the Carriage of Mail Ordered by the California Court of Appeal.

a. The Private Express Statutes Exist to Protect the Monopoly of the United States Postal Service.

Article I, section 8, clause 7, of the United States Constitution authorizes Congress to establish "post offices and post roads." This provision of the Constitution has traditionally been construed as granting Congress the authority to establish a federal monopoly over the delivery of mail. *Ex parte Jackson*, 6 Otto (96 U.S.) 727, 729 (1878); *United States Postal Service v. Brennan*, 574 F.2d 712, 713-15 (2d Cir. 1978); *National Ass'n of Letter Carriers v. Independent Postal System*, 470 F.2d 265, 267 (10th Cir. 1972).

The Private Express statutes generally prohibit delivery of letters along postal routes by anyone other than the United States Postal Service, but they establish certain statutory exceptions to the Postal Service's monopoly over the delivery of letters. 39 U.S.C. §§ 601-606; 18 U.S.C. §§ 1693-1699, 1724, *see* Apps. 16-17, A-100-A-102. Pursuant to these statutes, the United States Postal Service has developed rules permitting carriage of letters by individuals and entities other than the Postal Service. 39 C.F.R. §§ 310, 320, *see* Apps. 18-19, A-103-A-114. A major purpose of the Private Express statutes is to protect the monopoly, and hence the revenues, of the United States Postal Service, so as to facilitate the delivery of mail throughout the country. *United States Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 122 (1981); *United States v. Bromley*, 12 Howard (53 U.S.) 88, 96-97 (1851). The statutes, the exceptions they contain, and the regulations promulgated by the United States Postal Service should be read with this purpose in mind.

b. The Exception Is a Narrow One.

The statutory foundation for the Letters of the Carrier exception is 18 U.S.C. § 1694, which provides in pertinent part:

Whoever, having charge or control of any conveyance operating by land, air or water, which regularly performs

trips at stated periods on any post route, or from one place to another between which the mail is regularly carried, carries, otherwise than in the mail, any letters or packets, except such as relate to . . . current business of the carrier . . . shall, except as otherwise provided by law, be fined not more than \$50.

The regulation implementing the Letters of the Carrier exception provides:

The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the individual actually carrying the letters is not the person sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person (*see* § 310.3(b)(2)) and the letters must relate to the current business of such person.

39 C.F.R. § 310.3(b)(1).

We show below that the Letters of the Carrier exception does not apply to the union's letters because the union letters do not meet the first requirement of the exception in that they are not letters to the University, and because those letters do not meet the second requirement of the exception in that they do not relate to the "current business" of the University.

c. The Union Letters Are Not Addressed to the University.

The court below found "there are two prerequisites for application of the letters-of-the carrier exception: (1) the letter must be addressed to or sent from an individual in his or her capacity as an employee of the institution; and (2) the content of the letter must relate to the 'current business' of the institution." App. 1, A-8.

The court below paraphrased the Letters of the Carrier exception when it found that the first requirement of the exception is that the letter be addressed to or sent from an individual "in his or her capacity as an employee of the institution." There is an error in this paraphrasing, and it is that error which allowed the Court of Appeal to find that the first requirement of the exception is met

with respect to the letters in question. It is not accurate to say that the letter must be addressed to or sent from an individual "in his or her capacity as an employee of the institution." Rather, the regulation requires that the letter be addressed to or sent by the person that employs the individual who carries the letter. In this case, the person that employs the individual who carries the letter is the University.⁵ Accordingly, the letter must be sent either to the University directly or to the University through an agent.

The regulation is clear in this regard: "If the individual actually carrying the letters is not the person sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person. . . ." 39 C.F.R. § 310.3(b)(1), App. 18, A-110 (emphasis added). Thus, to fall within the Letters of the Carrier exception, letters from the union carried by an employee of the University must be addressed to the University. Not all letters sent to an individual "in his or her capacity as an employee of the institution," as the Court of Appeal would have it, are letters sent to the University. Rather, the letters must be sent to the employee as an agent of the University. That is, they must be letters of the carrier—in this case, letters of the University.

The difference between the Court of Appeal's formulation and the correct formulation is significant, because the Court of Appeal's formulation lacks any requirement of agency. Naturally, an entity such as a corporation or government agency can act only through individuals. Thus, certain acts of individuals may in the proper circumstances be said to be the acts of the entity. For example, an application for admission sent to the Director of Admissions is a letter to the University. However, a letter sent to the Director of Admissions by an insurance company offering him a special rate on his automobile insurance because he is an employee of the University is not a letter to the University, because it is not sent to the Director as an agent of the University. It does not attempt to induce him to direct University business to the company; it attempts to induce him to direct his own business

⁵ "Person" is defined by the regulations to include, *inter alia*, corporations and government agencies. 39 C.F.R. § 310.1(c).

to the company. The University may control his discretion in the former decision, but it may not control his discretion in the latter. Notwithstanding the Court of Appeal's apparent view that both letters would satisfy the first requirement of the Letters of the Carrier exception, only the letter concerning admission is a letter to the University. Therefore, the University employee who carries the application for admission is an employee of the person to whom the letter is addressed, but the University employee who carries the letter from the insurance company is not.

In reaching its conclusion regarding the first requirement of the exception, the court relied almost exclusively on the Advisory Opinion of the USPS. However, it reached its conclusion only by emphasizing certain language in the opinion and ignoring other limiting language. The Court of Appeal relied on the following passage in the Advisory Opinion:

Under this exception, an employee of the University who meets the qualifications set out in § 310.3(b)(2) may carry without payment of postage letters sent by *or addressed to members of the staff* or faculty in their official capacity as representatives of the employer University.

App. 1, A-8 (emphasis added by the Court of Appeal).

If the Postal Service letter concluded at the end of the phrase emphasized by the Court of Appeal, the court's decision might fairly reflect the advice it got. However, the court simply ignored the significance of the remainder of the sentence: the letter must be "addressed to members of the staff or faculty *in their official capacity as representatives of the employer University*." App. 9, A-72-A-73 (emphasis added).

Letters from a union to custodial workers of the University satisfy the first requirement of the Letters of the Carrier exception only if the letters are deemed letters to the University, which can occur only if the custodial workers can be said to have received the letters as representatives of the University. Once the issue is so stated, however, the answer is obvious on its face: the letters are in no sense letters to the University. They do not seek to

communicate with the institution itself through its agents. On the contrary, in receiving the union's letter, the employee does not serve as an agent of the University, but instead stands, with the union, in an arm's-length (some would say adversarial) relationship with the University. In fact, if the University attempted to learn the content of the letters, it could well be subjected to an unfair practice charge. Cal. Gov't Code § 3571(d). How a letter the contents of which are protected from disclosure to the University can be deemed letters to the University is hard to fathom. Had the court below more accurately paraphrased the regulation, it would have been evident that the first requirement of the Letters of the Carrier exception is not met with respect to letters from unions to employees "in their capacity as employees"; instead, it is met only with respect to letters to agents of the University acting within the scope of their agency.

This distinction was recognized more than seventy years ago in an opinion of the United States Attorney General involving precisely this issue. 29 Op. Atty. Gen. 418 (1912), App. 21, A-116. The question was whether the Erie Railroad Company could carry, as Letters of the Carrier, two categories of letters, both sent by the secretary of the Erie Employees' Relief Association, an organization concerned with the welfare of employees of the Railroad. The first category comprised letters to employees of the Railroad concerning a pension system for those employees. The second category comprised letters to the Railroad concerning relations between the Railroad and the Association. The Attorney General reasoned:

The constitution and by-laws of the Erie Employees' Relief Association show that the association is not a department of the railroad company, but a separate and independent organization, governed by directors of its own, having its own secretary, chosen by its directors, having its own funds and property wholly separate from those of the railroad, and having obligations and liabilities not attached upon the railroad. This being so, *it is not material that the purpose of the association and the subject of its communications is a pension system for the carrier's employees, and so a matter of interest to it,*

for the law excepts only the communications of the carrier itself. . . .

A different situation is presented by such of the letters referred to in your question as are addressed by the association to the railroad company (or its officers and employees as representing the railroad company) concerning relations between the railroad company and the association. These communications fall within both of the conditions imposed by Congress, because being addressed to the carrier itself, they are its communications within the intention of the statute, as shown by the opinions cited, and being on the subject of the carrier's own relation to the relief association, they relate to the carrier's current business.

29 Op. Atty. Gen. 418 (1912) (emphasis added).

Thus, in reaching its conclusion that the letters of the union satisfied the first requirement of the Letters of the Carrier exception, the Court of Appeal opposes not only the plain language of the regulation, but the long-standing interpretation of the United States Government as well.

d. The Union Letters Do Not Relate to the Current Business of the University.

Because the union letters do not meet the first requirement of the exception, it is not necessary in this case to resolve the question whether they "relate to the current business" of the University, which is the second requirement of the regulation. However, because the California Court of Appeal devoted almost all of its attention to the second part of the test, and because it misapprehended relevant case law, we turn to a brief consideration of the "current business" requirement as it applies to the union letters.

The court found that prefatory sections of HEERA declare a legislative intent to foster harmonious and cooperative labor relations, and that, in view of this intent, "collective bargaining" must be considered a part of the current business of the University, so that the union's letters satisfy the second part of the test.

The court below relied in part on *United States v. Erie Railroad*, 235 U.S. 513 (1915), for this conclusion. That reliance was misplaced, since, as shown below, *Erie* involved a tangential issue not present in the instant case and offers no support for the conclusion of the Court of Appeal.

When one entity sends a letter that is delivered by another entity, one way to establish that the letter relates to the current business of the carrying entity is to show that the two are not really separate entities, but rather share an identity to the extent that letters from one must relate to the current business of the other. The issue in *Erie Railroad* was whether a telegraph company that sent a letter and a railroad company that delivered the letter were one and the same entity for purposes of the exception. The court held that where the railroad shared facilities with the telegraph company and where the two companies jointly controlled communications equipment, employees, and financial responsibility, and where the letters related to their joint business, such an identity was established. In *United States v. Southern Pacific Co.*, 29 F.2d 433 (D. Ariz. 1928), the court was faced with the question whether a similar identity existed between the Southern Pacific Railroad Company of Mexico (the sender) and the Southern Pacific Company (the carrier). The two companies had interlocking directors, and the latter company owned virtually all of the stock of the former company and had furnished all of the money to construct the railroad of the former. Nonetheless, the court rejected Southern Pacific Company's claim that its carriage of the letters was permissible, stating that in *Erie Railroad*

[T]he interests of the railroad company and the telegraph company were united. There was a common interest in the receipts and in the maintenance and increase of business. In the instant case, there was no common corporate direct interest.

29 F.2d at 435.

These holdings have been codified in the regulations of the Postal Service. Those regulations provide that different entities may be considered one for purposes of the Letters of the Carrier

exception only if they jointly operate an enterprise with joint employees and if they share revenue and expenses. 39 C.F.R. § 310.3(b)(3). Even then, the regulation permits only the carriage of the letters of the joint enterprise, not the letters of one entity acting independently of the other entity.

The instant case is not one in which such an identity can seriously be asserted. We doubt that either PERB or the union would contend that the University and the union are one and the same entity or a joint enterprise. Accordingly, the reliance of the Court of Appeal on *Erie* is misplaced.

There are, of course, other means by which one may show that a letter relates to the current business of the carrier. Showing an identity between the carrier and the sender is but one means of reaching that conclusion. We believe that what PERB, as well as the Court of Appeal, had in mind in the instant case was not that the union and the University are a joint enterprise like the railroad and the telegraph company, but rather that though they are distinct entities, the letter of the union does relate to the "current business" of the University within the meaning of the exception. For that conclusion, the opinion of this Court in *Erie Railroad* is not helpful.

Also not on point is this Court's decision in *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, *supra*, on which the court below relied. As we note above, in *Perry*, this Court specifically declined to decide whether a union's use of a school's internal mail system without payment of postage violated the Private Express statutes. The Court did so because it "agree[d] with the Postal Service that this question does not directly bear on the issues before the Court in this case." 460 U.S. at 40 n.1. The court below misinterpreted *Perry*, explaining that the Postal Service "acknowledged that the facts in *Perry* did not directly bear on the issue" of the Private Express statutes. App. 1, A-10 n.8 (emphasis supplied). As is clear from the above quotation from *Perry*, however, it was not a lack of pertinent facts that induced this Court to make no holding on the Private Express statutes. On the contrary, what the Court found was that the Letters of the Carrier question did not bear directly on the issues before the Court. The issues litigated in *Perry* were constitutional issues involving the

First and Fourteenth Amendments, and this Court framed its analysis to fit those very different issues. The assertion of the court below that it could "discern no meaningful distinction" between this Court's designation of "official business" in *Perry* and the "current business" of an institution for purposes of the Private Express statutes, App. 1, A-11, demonstrates that the court did not come to terms with the purpose or meaning of the Private Express statutes. "Official business" is a term of art in First Amendment case law; it has to do with the use of a forum for expression of viewpoints by the public owner of the forum, as compared to others. The concept of "official business" in that context is irrelevant to an interpretation of the "current business" requirement of the Letters of the Carrier exception. But *Perry* is relevant to the instant case because it demonstrates that the issue raised in this appeal is not a unique or isolated one, but an important one which has been deliberately left open in earlier litigation.⁶

If these authorities do not establish the meaning of the phrase "current business" for purposes of the exception, what does? We do not believe that this case requires a definitive answer, because the union letters are not letters to the University, and therefore not Letters of the Carrier. But if an answer is to be found, the analysis should begin not with *Erie* or *Perry*, but with the words and structure of the exception.

When the Court of Appeal looked to state law to determine what the "current business" of the University was, it failed to take into account that the definition of "current business" is a question of federal law. In one sense, of course, the state does define the "current business" of the University. It has created the University and defined its mission, and, of course, it has great discretion in how it acts. On the other hand, federal law defines what "current business" means under the Postal laws. Yet the Court of Appeal found that the California Legislature had made the business of a nonstate entity and the business of a state agency the same so that

⁶ *Perry* also helps to establish, contrary to PERB's finding, that the Private Express statutes as applied are constitutional. See n. 3, *supra*, p. 7.

the state agency may deliver the mail of the nonstate entity and stay within the Letters of the Carrier exception.

In evaluating the propriety of a state's declaration of an agency's "current business," the possibility of encroachment on federal interests must be considered. That is, would the state's declaration, if given effect, "stand as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress"? *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In enacting the Private Express statutes, one of Congress's purposes was to protect the revenue of the Postal Service. *United States Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 122 (1981). One reason such a monopoly is considered desirable is that the delivery of some mail is profitable at acceptable postal rates and the delivery of other mail is not. A determination has been made by the United States Congress that it is in the national interest to distribute these costs by the maintenance of a national postal service. It would be inconsistent with those purposes to find that a state legislature could deprive the Postal Service of sources of revenue merely by decreeing that the business of one entity is the business of the other for purposes of qualifying them for the Letters of the Carrier exception.

The union letters do not relate to the "current business" of the University, unless that phrase is so broadly interpreted as to bring virtually any business within its scope. Certainly, the authorities relied on by the Court of Appeal do not support such a broad reading of the phrase. However, even if it is assumed, *arguendo*, that the letters of the union do relate to the current business of the University for purposes of the exception, it is very clear, as we have shown above, that the exception does not apply to the letters in question, because the first requirement of the exception is not met.

3. The Federal Interest Is Substantial and Has Not Been Adequately Considered.

Congress undertook to modernize the postal system in 1970 when it adopted the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (codified at 39 U.S.C. §§ 101-5605 (1982)). That Act contains a statement of postal policy declaring:

The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. The costs of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people.

39 U.S.C. § 101(a) (1982).

The decision of the Court of Appeal, if converted into binding precedent by dismissal of the instant appeal, will have ramifications far beyond the University of California and the State of California. The record in this case discloses that one union at one University location with limited membership spent two to three thousand dollars a year on postage. There are many unions, many campuses (and hospitals, research laboratories, and research facilities), and thousands of employees in the University of California. Moreover, the rationale in this case affects a multitude of schools and other public and private institutions all over the nation. If this decision stands, the cost to the Postal Service will be severe, and that cost will impair the capacity of the Service to accomplish the objectives set for it by Congress.

Yet, throughout this litigation, neither PERB nor the Court of Appeal appears to have given serious consideration to the federal interests involved. Rather, federal interests have been totally subordinated to the perceived state interests involved. For example, in its initial remand to PERB, the Court of Appeal did not direct PERB to consider directly whether its order violated the Private Express statutes; instead, the Court of Appeal instructed PERB to consider whether the University's regulations denying union access to the internal mail system were "reasonable in light of all the surrounding circumstances, including federal postal requirements." App. 7, A-63. According to the court, "PERB was

free to consult federal law in order to determine whether the state statute may be enforced without offending federal postal regulations." App. 1, A-4. However, it is not clear that PERB would have been free to declare that the state statute could *not* be enforced, in light of Article III, section 3.5, of the California Constitution, which prohibits administrative agencies from declining to enforce state statutes "on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations." App. 4, A-16. In any event, federal law is not just one of several equally relevant "surrounding circumstances" that PERB should feel "free to consult." Under the Supremacy Clause of the Federal Constitution, federal law is determinative.

On remand, PERB held that the Letters of the Carrier exception applied because, in its view, the union letters related to the "current business" of the University. However, PERB never addressed the question whether the letters were letters to the University, which is the first requirement of the exception. Instead, it simply said that the test was whether the letters concerned the "current business" of the University. App. 4, A-37.

PERB also concluded that the statutory exception to the Private Express statutes for letters delivered by "private hands without compensation" applied, notwithstanding the Advisory Opinion of the United States Postal Service to the contrary. PERB declared the Postal Service's position "infirm," stating that although the Court of Appeal had noted in its remand decision that the official interpretation of statutes and regulations by a federal agency is entitled to great deference, PERB's administrative determinations were "entitled to a similar level of deference." App. 4, A-29, A-31. PERB then went on to find that the carriage by the University was without compensation, even though the state, which PERB believes has ordered the carriage, has also paid for it.

Finally, PERB ruled that the suspension of the Private Express statutes for "bona fide student or faculty organizations" applied to non-faculty custodial employees using the following reasoning: (1) Although the Postal Service has indicated that ordinarily the

suspension does not apply to labor union materials, it "has not ruled out the possibility that a labor organization representing faculty members at a college or university could use the internal mail system under the suspension," App. 4, A-42; (2) labor organizations representing non-faculty employees are not entitled to the benefits of the suspension; (3) a regulation that distinguishes between a labor organization representing faculty members and one representing other employees is not constitutionally permissible; (4) the Postal Service's determination that the suspension does not apply to an employee organization representing non-teaching employees is thereby rendered "at the very least, constitutionally suspect and not entitled to the deference ordinarily owed to its opinions," App. 4, A-42; and (5) therefore, the suspension applies to non-faculty, as well as to faculty, organizations.

Notwithstanding the lengths to which PERB has gone to frustrate the clear intent behind the Private Express statutes, the Court of Appeal on review stated that it would regard PERB's construction "with deference" and stated that its decision should be followed "unless it is clearly erroneous." App. 1, A-6. Then, the court, in a 13-page slip opinion, devoted a single paragraph to the question whether the letters of the union met the first requirement of the Letters of the Carrier exception.

The notion that PERB's interpretation of federal statutes and regulations should be treated with deference—especially when its interpretation conflicts with that of the federal agency charged with their enforcement—is both surprising and erroneous. Equally erroneous is the Court of Appeal's apparent balancing of the state and federal interests involved. The Court of Appeal stated:

Although the U.S.P.S. presumably will sustain a slight loss of mail revenue as a consequence, we do not believe, as the University asserted at oral argument, that our determination will somehow expose the University's internal mail system to a deluge of other communications possessing but a peripheral relationship to University business. We only hold that where, as here, the state Legislature has clearly emphasized the public interest in developing harmonious labor relations between the Uni-

versity and its employees, the internal mail system may be used by the interested parties for purposes of relevant communications.

App. 1, A-11.

To the extent that the Court of Appeal engaged in a balancing of state and federal interests in reaching its conclusion, it erred as a matter of federal law. This Court has clearly established that where "the issue is one of an asserted substantive conflict with a federal enactment, then '[t]he relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that the federal law must prevail.'" *Brown v. Hotel Employees Local 54*, 468 U.S. 491, 503 (1984) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

As the Court has long recognized, the statute under which this appeal is taken "proceeds on the theory that through inadvertence or design those who are entrusted with the legislative power of a State may exercise the same in a manner forbidden by the Constitution of the United States, and the state courts may uphold such legislation when it should be held invalid." *King Mfg. Co. v. Augusta*, 277 U.S. 100, 104 (1928). That is precisely what has happened in this case, and we respectfully urge the Court to exercise its jurisdiction in protection of federal prerogatives.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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The Regents of the

University of California

December 5, 1986

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Appendix 1

[182 Cal.App.3d 71]

[No. A029706. First Dist., Div. One. June 9, 1986.]

The Regents of the University of California,
Petitioner,

v.

Public Employment Relations Board,
Respondent;

William H. Wilson et al., Real Parties in Interest.

SUMMARY

In a proceeding before the Public Employment Relations Board (PERB) based upon the claim by an employee of the University of California and a public employees' union that the university was committing an unfair labor practice under certain provisions of the Higher Education Employer-Employee Relations Act (HEERA) (Gov. Code, §§ 3568, 3571), by refusing to permit the union to distribute organizational literature to the university's custodial employees through the intercampus mail system, the PERB issued an order compelling the university to grant the union access to the university's internal mail service. The Court of Appeal granted the university's petition for a writ of review and remanded the matter for a determination whether the university's regulations denying union access to the internal mail system were reasonable. On remand, addressing the crucial issue concerning a potential conflict with U.S. Postal regulations, the PERB determined that the university's delivery of union communications fell within two exceptions and one suspension established by federal law and, accordingly, the PERB again found that the university's regulations were unreasonable within the meaning of Gov. Code, § 3568, and ordered that the university grant the union access to the university's internal mail service.

The Court of Appeal affirmed, holding that the union's use of the university's internal mail system fell within the so-called "letters-of-the-carrier" exception, set forth in 18 U.S.C. § 1694 and 39 C.F.R., § 310.3, subd. (b), and that no conflict exists

between the HEERA and federal postal regulations. The court held that the union letters to the university's custodial employees met the two prerequisites for application of the letters-of-the-carrier exception: the union letters were addressed to or sent from an individual in his or her capacity as an employee of the institution; and the content of the letters, collective bargaining, related to the "current business" of the university. (Opinion by Racanelli, P. J., with Newsom and Holmdahl, JJ., concurring.)

OPINION

RACANELLI, P. J.—For the second time we have granted a writ of review to consider the propriety of an order issued by the Public Employment Relations Board (PERB) compelling the employer, the University of California (University,) to grant an employee organization access to the University's internal mail service.

In *Regents of University of California v. Public Employment Relations Board* (1983) 139 Cal.App.3d 1037 [189 Cal.Rptr. 298], we set forth the salient facts in this dispute at pages 1039 and 1040 and reiterate them here for convenience: "In 1979, William H. Wilson and Local 371 of the American Federation of State, County and Municipal Employees filed an unfair labor practice charge against the University before the PERB asserting that the University's refusal to permit the union to distribute organizational literature to the University's custodial employees through the intercampus mail system violated the rights guaranteed to employee organizations and employees under the provisions of the Higher Education Employer-Employee Relations Act (HEERA), reproduced in relevant part in the margin.¹

¹ The statutes provide in pertinent part: Government Code section 3568: "Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act."

Government Code section 3571: "It shall be unlawful for the higher education employer to: (a) Impose or threaten to impose reprisals on

"The charge arose against the following background: The University maintains two operational units for its mail system at Berkeley. Mail collection and delivery for the Berkeley campus, nearby University state-wide offices and intercampus mail for the northern California campuses and laboratories are handled by the Harmon Gym facility at Berkeley. There, the outgoing mail is separated into three groups: (1) prestamped mail; (2) internal University mail for northern California; and (3) other mail.

"The prestamped mail is delivered immediately to the United States Postal Service (U.S.P.S.) without further handling by the University. Internal University mail is monitored to assure that only official business mail is involved. This nonposted mail is then sorted and delivered.

"Other mail is then taken to a second unit, denoted '2000 Carleton.' These pieces are rated, affixed with United States postage and delivered to the U.S.P.S. Senders are recharged by office or department at regular postage rates plus 25 percent.

"Incoming mail to the University from the U.S.P.S. is handled in one of two ways: mail addressed to any of some 50 sites on the Berkeley campus is delivered to the site by the U.S.P.S.; other United States mail, not so addressed, is delivered to Harmon Gym where delivery is completed by University employees.

"In summary, the only mail accepted for delivery within the University's internal mail system is either posted mail which comes to Harmon Gym from the U.S.P.S. or official University business mail. The University has adopted regulations which deny use of its internal mail system to non-University organizations or for political, commercial or social purposes. Employee organizations are expressly prohibited from using the internal mail service. Pursuant to these regulations, the University has refused to deliver mail tendered by the union relating to its organizational activities unless the mail is stamped and sent through the

employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter, (b) Deny to employee organizations rights guaranteed to them by this chapter."

U.S.P.S. It is that refusal which forms the basis of the union's unfair practice charge."

Based on a solicited advisory opinion from the U.S.P.S., the University took the position that carriage by the University in its internal mail distribution system of the letters of a union seeking to represent the University's custodial employees, without payment of postage, is prohibited by the Private Express Statutes. (18 U.S.C. §§ 1693-1699, 1724; 39 U.S.C. §§ 601-606.)²

After an appropriate hearing and administrative appeal the PERB ordered the University to allow free access to the inter-campus mail system. Thereafter, we granted University's petition for a writ of review. Upon considering the University's challenge to the PERB order, we concluded that certain preliminary factual issues needed to be determined before a ruling on the order could be made. Accordingly, we remanded the matter for a determination whether the University's regulations denying union access to the internal mail system were reasonable in light of all the surrounding circumstances, including federal postal requirements. In reaching its determination, we suggested that the PERB consider (1) the University's distribution of literature through the internal mail system to disseminate an employee newsletter expressing management's views on labor-management issues; (2) the University's distribution of literature through the internal mail system soliciting charitable contributions deemed official business under the auspices of the chancellor; (3) the union's access to other means of communicating with custodial employees; and (4) the burden which would be placed on the University's internal mail system if access were provided. Most importantly, we stated that the PERB was free to consult federal law in order to determine whether the state statute may be enforced without offending federal postal regulations. (*Regents of University of California v. Public Employment Relations Bd.*, *supra*, 139 Cal.App.3d at p. 1042 and fn. 5.)

² Additionally, 18 United States Code section 1693 provides: "Whoever, being concerned in carrying the mail, collects, receives, or carries any letter or packet, contrary to law, shall be fined not more than \$50 or imprisoned not more than thirty days, or both."

After a subsequent evidentiary hearing and administrative appeal, the PERB found that: (1) articles and newsletters disseminated to employees by the University via the University mail system do include management positions on issues pertinent to employer-employee relations; (2) on at least three occasions the University has allowed use of the internal mail system by non-employee organizations; (3) the union is not required to use an alternative means of communicating with employees where, as here, the University has made no showing that permitting employee organizations to have access to the internal mail system will disrupt the functioning of the University (see *Richmond Unified School District* (1979) 3 PERC, ¶ 10105) and (4) there was no convincing evidence that permitting an employee organization to have access to the internal mail system would create any additional financial burden on the University. Regarding the crucial issue concerning a potential conflict with U.S. postal regulations, the PERB determined that the University's delivery of union communications falls within two "exceptions" and one "suspension" established by 18 United States Code section 1694³ and 1696⁴ and 39 Code of Federal Regulations section

³ 18 United States Code section 1694 provides in pertinent part: "Whoever, having charge or control of any conveyance operating by land, air or water, which regularly performs trips at stated periods on any post route, or from one place to another between which the mail is regularly carried, carries, otherwise than in the mail, any letters or packets, except such as relate to . . . current business of the carrier . . . shall, except as otherwise provided by law, be fined not more than \$50." (See also, 39 C.F.R. § 310.3(b).)

⁴ 18 United States Code section 1696 provides in pertinent part: "(a) Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, . . . shall be fined not more than \$500 or imprisoned not more than six months, or both . . . (c) This chapter shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation, . . ." (See also, 39 C.F.R. § 310.3(c).)

320.4.⁵ Accordingly, the PERB again found that the University's regulation prohibiting employee organization access to its internal mail system is unreasonable within the meaning of Government Code section 3568 and ordered that the University grant the union access to the University's internal mail service.

Discussion

Preliminarily, we note that under Government Code section 3564, subdivision (c) the "findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, are conclusive." In addition, the rule is that "[u]nder established principles, PERB's construction is to be regarded with deference by a court performing the judicial functions of statutory construction, and will generally be followed unless it is clearly erroneous." (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 856 [191 Cal.Rptr. 800, 663 P.2d 523]; *Regents of the University of California v. Public Employment Relations Bd.* (1986) 177 Cal.App.3d 648, 653 [223 Cal.Rptr. 127].)

We need not address each of the three regulations upon which the PERB based its order. For the reasons stated below we are

⁵ 39 Code of Federal Regulations section 320.4 provides: "The operation of 39 U.S.C. 602(a)(1) through (6) and § 310.2(b)(1) through (6) of this chapter is suspended on all post routes to permit colleges and universities to carry in their internal mail systems the letters of their *bona fide* student or faculty organizations to campus destinations. This suspension does not cover the letters of faculty members, students, or organizations other than *bona fide* student or faculty organizations of the carrying college or university. Colleges and universities choosing to provide their student or faculty organizations access to their internal mail systems are responsible for assuring that only letters of *bona fide* student or faculty organizations addressed to campus destinations are carried. (See § 310.4.) For purposes of this suspension, 'internal mail systems' are those which carry letters on, between, and among the various campuses of a single college or university and which operate in accordance with the *Letters of the carrier* exception in 39 CFR 310.3(b)." (Italics in the original.)

satisfied that the union's use of the University's internal mail system falls within the so-called "letters-of-the-carrier" exception as set forth in 18 United States Code section 1694 and 39 Code of Federal Regulations section 310.3, subdivision (b), and that no conflict exists between the HEERA and federal postal regulations.

As the PERB recognized, Article I, section 8, clause 7 of the United States Constitution authorizes Congress to establish "post offices and post roads." This provision of the Constitution has traditionally been construed as granting the federal government a monopoly over the delivery of mail. (*Associated Third Class Mail Users v. U.S. Postal Serv.* (D.C. Cir. 1979) 600 F.2d 824; *National Ass'n of Letter Car. v. Independent Postal Sys.* (10th Cir. 1972) 470 F.2d 265; *Ex Parte Jackson* (1878) 96 U.S. 727 [24 L.Ed. 877].) The Private Express Statutes (39 U.S.C. §§ 601-606; 18 U.S.C. §§ 1693-1699, 1724) generally prohibit the delivery of letters along post routes by anyone other than the United States Postal Service, but establish certain statutory exceptions to the Postal Service's monopoly over the delivery of letters. Pursuant to these statutes, the United States Postal Service has developed rules permitting private carriage of letters by individuals and entities. (39 C.F.R. §§ 310, 320.)

The letters-of-the-carrier exception to the general prohibition regarding delivery of mail by non-U.S.P.S. persons is contained in 18 United States Code section 1694.⁶ U.S.P.S.'s implementing regulation of the letters-of-the-carrier exception, 39 Code of Federal Regulations section 310.3, subdivision (b)⁷, permits a

⁶ See footnote 3, *supra*.

⁷ Subdivision (b) of 39 Code of Federal Regulations 310.3 states: "(1) The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the individual actually carrying the letters is not the person sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person (see § 310.3(b)(2)) and the letters must relate to the current business of such person.

"(2) The fact that the individual actually carrying the letters may be an officer or employee of the person sending the letters or to whom the

person or entity to deliver its own letters to another address or to pick up letters addressed to it from another person or entity. Where the carrier is an institution rather than an individual, letters addressed to its employees must concern the "current business" of that institution; the exception does not permit an employer to carry personal letters addressed to its employees. Thus, there are two prerequisites for application of the letters-of-the-carrier exception: (1) the letter must be addressed to or sent from an individual in his or her capacity as an employee of the institution; and (2) the content of the letter must relate to the "current business" of the institution.

Clearly, union letters to the University's custodial employees meet the first requirement. In its advisory letter to the University, the U.S.P.S. stated: "The [l]etters of the carrier exception permits an employer to deliver his own letters on his own current business by means of his own employees. Under this exception, an employee of the University who meets the qualifications set out in § 310.3(b)(2) may carry without payment of postage letters sent by *or addressed to members of the staff* or faculty in their official capacity as representatives of the employer University. It is this exception which permits the University's current use of an internal distribution system for mail pertaining to its business which is

letters are addressed for certain purposes does not necessarily mean that he is an officer or employee for purposes of this exception. The following factors bear on qualifications for the exception: the carrying employee is employed for a substantial time, if not fulltime (letters must not be privately carried by casual employees); the carrying employee carries no matter for other senders; the carrying employee is a regular salaried employee and shares in all privileges enjoyed by other regular employees (including employees not engaged primarily by the letter carrying function), including but not limited to salary, annual vacation time, absence allowed for illness, health benefits, workmen's compensation insurance, and retirement benefits.

"(3) Separately incorporated carriers are separate entities for purposes of this exception, regardless of any subsidiary, ownership, or leasing arrangement. When, however, two concerns jointly operate an enterprise with joint employees and share directly in its revenues and expenses, either of the concerns may carry the letters of the joint enterprise."

sent to and from locations within the University." (Italics supplied.) The more difficult question is whether the communications from the union to University employees relates to the current business of the University.

In enacting the HEERA, the California Legislature explicitly stated its findings and intent. Government Code section 3560, subdivision (a) expresses the finding that "[t]he people of the State of California have a fundamental interest in the development of harmonious and cooperative labor relations between the public institutions of higher education and their employees." Thereafter, subdivision (d) of the same section states that "[t]he people and the aforementioned higher education employers each have a fundamental interest in the preservation and promotion of the responsibilities granted by the people of the State of California. Harmonious relations between each higher education employer and its employees are necessary to that endeavor." Finally, subdivision (e) of the statute declares: "It is the purpose of this chapter to provide the means by which relations between each higher education employer and its employees may assure that the responsibilities and authorities granted to the separate institutions under the Constitution and by statute are carried out in an atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them. It is the intent of this chapter to accomplish this purpose by providing a uniform basis for recognizing the right of the employees of these systems to full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of representation in their employment relationships with their employers and to select one of such organizations as their exclusive representative for the purpose of meeting and conferring." Unmistakably, the intent of the statute is to make collective bargaining a part of the "current business" of the University.

Although no case has so construed the intent of Government Code section 3560, we find strong support for our view from the United States Supreme Court. In *United States v. Erie Railroad* (1915) 235 U.S. 513 [59 L.Ed. 335, 35 S.Ct. 193], the high court held that the letters-of-the-carrier exception applied to the car-

riage of letters for a telegraph company by a railroad pursuant to an agreement between the companies. Under the agreement the railroad company leased to the telegraph company the right to operate telegraph lines which previously had been operated by the railroad. The railroad was given 25 percent of the cash receipts and joint supervision and control of a superintendent of telegraph who was paid by both companies. While the U.S.P.S. maintains in its Amicus brief that the *Erie* decision was based on the assumption that the telegraph operations was a joint enterprise, the language of the opinion indicates otherwise. In explaining its decision, the court stated, "[W]hile the companies in many respects are independent, they are also, in some respects, at least, dependent [W]hile it may be said that there is a railroad business in which the telegraph company has no concern, that is, business distinctly railroad, yet it is also so far concerned with the telegraph business as to make its efficient and successful operation of interest to it." (*Id.*, at p. 520 [59 L.Ed. at p. 341].) Given the intent expressed in Government Code section 3560, we find the above-quoted reasoning equally applicable to the case at bench.

More recently, in *Perry Ed. Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37 [74 L.Ed.2d 794, 103 S.Ct. 948], the U.S. Supreme Court had occasion to consider a question concerning union access to the internal mail system of the Perry Township schools. In that case, a collective-bargaining agreement with the Board of Education provided that the Perry Education Association, but no other union, would have access to the interschool mail system. The issue presented to the Supreme Court was whether the denial of similar access to a rival teacher union violated the First and Fourteenth Amendments. Although the court was not concerned with the same issue as is presently before this court⁸, it expressed the following pertinent view on labor-

⁸ In *Perry*, the U.S.P.S. submitted an amicus curiae brief suggesting that the interschool delivery of material to teachers at various schools in the district might violate the same Private Express statutes with which we are concerned in the present action. However, the U.S.P.S. acknowledged that the facts in *Perry* did not directly bear on the issue. Accordingly, the Supreme Court expressed no opinion on the potential

management relations: "The very concept of the labor-management relationship requires that the representative union be free to express its independent view on matters within the scope of its representational duties. The lack of an employer endorsement does not mean that the communications do not pertain to the 'official business' of the organization." (*Id.*, at p. 51, fn. 10 [74 L.Ed.2d at p. 808].)

We discern no meaningful distinction between the U.S. Supreme Court's designation of "official business" and the postal statutes' designation of "current business" of an organization. The fact that the University is free to disseminate its own views on labor-management relations through internal carriage of the University's employee newspaper would appear to mandate equal access to employees by an employee organization in an arguably adversarial position. Accordingly, we find that the union's use of the University's internal mail system to communicate with University employees falls within the letters-of-the-carrier exception and there is no conflict with federal regulations.

Although the U.S.P.S. presumably will sustain a slight loss of mail revenue as a consequence, we do not believe, as the University asserted at oral argument, that our determination will somehow expose the University's internal mail system to a deluge of other communications possessing but a peripheral relationship to University business.⁹ We only hold that where, as here, the state Legislature has clearly emphasized the public interest in developing harmonious labor relations between the University and its employees, the internal mail system may be used by the interested parties for purposes of relevant communications.

The PERB order is affirmed.

Newsom, J., and Holmdahl, J., concurred.

conflict. (See, *Perry Ed. Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37, 39, fn. 1 [74 L.Ed.2d 794, 801].)

⁹ While such matters as the University's investments in South Africa may conceivably be considered a part of University business, full participation in the decision-making process concerning such subjects is not mandated by statute.

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Appendix 2

Court of Appeal of the State of California
for the First Appellate District
Division: 1

University of California
General Counsel
590 University Hall
2199 Addison St.
Berkeley, CA 94720

The Regents of the University of Calif.
vs.
Public Employment Relations Board
Wilson, William H., et al.
A029706
San Francisco County No. SF-CE-4-H

* * REMITTITUR * *

I, RON D. BARROW, Clerk of the Court of Appeal of the State of California, for the First Appellate District, do hereby certify that the decision entered in the above-entitled cause on June 9, 1986 has now become final.

- ☐ Appellant ☐ Respondent to recover costs
☐ Each party to bear own costs
☒ Costs are not awarded in this proceeding

Witness my hand and the seal of the
Court affixed at my office this
SEP 11 1986

[SEAL]

RON D. BARROW, Clerk

By: P. KEELEY
 Deputy

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Appendix 3

Order Denying Review

After Judgment by the Court of Appeal

1st District, Division 1, No. A029706

In the Supreme Court of the State of California

In Bank

[Filed Sept. 10, 1986]

The Regents of the University of California, Petitioner,

v.

Public Employment Relations Board, Respondent,
William H. Wilson et al., Real Parties in Interest.

Petition for review DENIED.

Lucas, J., is of the opinion the petition should be granted.

BIRD
Chief Justice

Appendix 4

State of California
Decision of the
Public Employment Relations Board

Case No. SF-CE-4-H

PERB Decision No. 420-H

October 18, 1984

William H. Wilson,
Charging Party,

vs.

University of California at Berkeley,
Respondent.

On Remand from the Court of Appeal,
First Appellate District

Appearances: Andrew Thomas Sinclair, Attorney for William H. Wilson; Susan M. Thomas, Attorney for the Regents of the University of California.

Before Jaeger, Morgenstern and Burt, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (PERB or Board) on remand from the Court of Appeal, First Appellate District, in which the Court directed the Board to determine, inter alia, whether the policies of the University of California at Berkeley (UC or University) regarding employee organization access to its internal mail system are reasonable in light of all the surrounding circumstances, including federal postal statutes and regulations.

For the reasons set forth below, we conclude that the University's policies are not reasonable within the meaning of section 3568 of the Higher Education Employer-Employee Relations Act (HEERA or Act) and all the surrounding circumstances, including federal postal statutes and regulations, and find that UC violated subsections 3571(a) and (b) of the Act when it withdrew

the right of employee organizations to use its internal mail system.¹

PROCEDURAL HISTORY

On November 16, 1979, William H. Wilson, as an individual and on behalf of the American Federation of State, County, and Municipal Employees, Local 371 (AFSCME or Union) filed an unfair practice charge against the University of California at Berkeley alleging that the University violated HEERA sections 3568 and 3571(a), (b), and (d).

On June 17, 1980, a Public Employment Relations Board Administrative Law Judge (ALJ) issued a proposed decision finding that the University violated HEERA subsections 3571(a) and (b).

The University appealed the proposed decision to the Board itself.

¹ HEERA is codified at Government Code section 3560 et seq. All references are to the Government Code unless otherwise indicated.

Section 3568 provides:

Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act.

Section 3571 provides, in relevant part:

It shall be unlawful for the higher education employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

On November 25, 1981, the Board issued PERB Decision No. 183-H affirming the hearing officer's proposed decision.

The University appealed PERB Decision No. 183-H to the First District Court of Appeal, arguing, *inter alia*, that delivery of employee organization mail free of charge through the University's internal mail system was precluded by the federal "Private Express Statutes" (39 U.S.C. sections 601-606; 18 U.S.C. sections 1693-1699) and the rules promulgated thereunder by the United States Postal Service (Postal Service or USPS) (39 C.F.R. sections 310 and 320) protecting the federal postal monopoly and regulating private delivery of mail.

On February 17, 1983, the Court issued its decision (139 Cal.App.3d 1037). The Court found that Article III, section 3.5 of the California Constitution² precluded PERB from refusing to enforce HEERA rights on the ground of federal preemption in the absence of an antecedent court ruling. However, the Court held that PERB was not precluded from determining "whether the state statute . . . and the federal postal laws and regulations can be harmonized." (139 Cal.App.3d at 1042.) Thus, the Court remanded the case to the Board to determine:

... whether the University's regulations denying union access to the internal mail system are reasonable in light of all the surrounding circumstances, including federal postal requirements. (139 Cal.App.3d at 1042.)

² Article III, section 3.5 provides:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

- (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
- (b) To declare a statute unconstitutional;
- (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless such statute is prohibited by federal law or federal regulations.

In making this determination, the Court indicated that PERB may:

... properly consider circumstances emphasized in this writ proceeding but yet to be evaluated: e.g., the University's use of its mail system to disseminate an employee newsletter expressing management's views on labor-management issues; the University's distribution of literature through the internal mail system soliciting charitable contributions deemed official business under the auspices of the Chancellor; the union's access to other means of communicating with custodial employees; the burden which would be placed on the University's internal mail system. (139 Cal.App.3d at 1042, fn 6.)

On March 18, 1983, in response to the remand order of the Court of Appeal, the Board issued PERB Decision No. 183a-H, in which it remanded the record to the Chief Administrative Law Judge to conduct a hearing "for the purpose of taking additional evidence as to whether the University's regulations concerning the use of its internal mail system by employee organizations are reasonable within the meaning of section 3568 of [HEERA]." The Board directed the Chief Administrative Law Judge to solicit evidence concerning the following issues:

1. To what extent are the materials charging party seeks to distribute "letters" within the meaning of the federal postal regulations?
2. What compensation, if any, does the University receive for delivery of employee organization materials?
3. What relationship, if any, exists between the University's mail system and United States postal routes?
4. Does the University utilize its mail system to disseminate management material pertinent to employer-employee relations?
5. Does the University permit the use of its mail system by charitable and other nonemployee organizations?

6. What burden, if any, would be placed on the University's mail system if it were made available to employee organizations?

Administrative Law Judge (ALJ) Jim Tamm conducted a hearing to solicit additional evidence, and on June 2, 1983, made factual findings directly responsive to the questions posed by the Board in Decision No. 183a-H.

Both the University and the Charging Party have filed exceptions to some of the factual findings made by the ALJ.

FACTS

Both the original proposed decision of the hearing officer and the proposed decision issued pursuant to the Board's Order in Decision No. 183a-H are attached hereto (omitted-Ed.). We have reviewed these factual findings, and finding them free from prejudicial error, adopt them as the findings of the Board itself.³

DISCUSSION

HEERA section 3568 represents a codification by the California Legislature of longstanding precedent under the National

³ The University reasserts a motion, which was denied by ALJ Tamm, to exclude all evidence concerning delivery of mail at Lawrence Livermore National Laboratory (LLNL). The University contends that, since the unfair practice charge in this case concerns the University's denial of access to the UC mail system at the Berkeley campus, evidence concerning other campuses or facilities of the University is irrelevant. We disagree. The Court of Appeal's Order in this case requires the Board to determine "whether the University's regulations denying union access are reasonable in light of all the surrounding circumstances, . . ." Thus, as the ALJ noted, it was not the intention of the Court of Appeals to limit evidence to only one UC facility but, rather, to look at the entire system. While the unfair practice charge in this case is limited to the Berkeley campus, evidence concerning LLNL is probative of the overlap of USPS and UC mail routes and helps paint a picture of the functioning of the UC mail system as a whole.

Labor Relations Act (NLRA)⁴ granting employee organizations the right of access to an employer's property for organizational and representational purposes. See Morris, *The Developing Labor Law* (2d Ed. 1983), Chap. 6; *Republic Aviation Corporation* (1945) 324 U.S. 793 [16 LRRM 620]; *Stoddard-Quirk Mfg. Co.* (1962) 138 NLRB 615 [51 LRRM 1110]; *Beth Israel Hospital* (1978) 437 U.S. 483 [98 LRRM 2727].⁵

The language of section 3568 is virtually identical to that of subsection 3543.1(b) of the Educational Employment Relations Act (EERA).⁶ In *Richmond Unified School District/Simi Valley Unified School District* (8/1/79) PERB Decision No. 99, the Board analyzed the statutory phrase "other means of communication" as set forth in EERA subsection 3543.1(b), and concluded that employee organizations were entitled to have access to internal mail systems. The Board's decision was based on its view that the means of access specified in subsection 3543.1(b) were not intended by the Legislature to be exhaustive, a view which is consistent with interpretations of similar statutory language contained in the Meyers-Milias-Brown Act (Government Code sec-

⁴ 29 U.S.C. 151 et seq.

⁵ However, unlike the court-created access rights under the NLRA, those under HEERA are expressly statutory.

⁶ The EERA is codified as Government Code section 3540 et seq. EERA subsection 3543.1(b) provides:

Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

Although no parallel section governing access rights exists in the State Employer-Employee Relations Act (SEERA), Government Code section 3512 et seq., this Board, in *State of California (Dept. of Corrections)* (5/5/80) PERB Decision No. 127-S, determined that such rights could be implied. See also *State of California (Dept. of Transportation)* (7/7/81) PERB Decision No. 159b-S.

tion 3500 et seq.). *Richmond Unified School District/Simi Valley Unified School District, supra*; 45 Ops. Atty. Gen. 138. We reaffirm this finding, and conclude that the phrase "other means of communication" in HEERA section 3568 entitles employee organizations to have access to the University's internal mail system free of charge⁷ subject to "reasonable regulation."

In its brief before the Board, the University does not dispute that section 3568 creates a right of access to internal mail systems, but asserts that a total ban on employee organization access to its internal mail system is a "reasonable regulation" within the meaning of section 3568. In its view, denial of access to the internal mail system is reasonable because alternative means of communication exist by which employee organizations may communicate with their members, because access to its internal mail system would place an "undue burden" on the system, and because, in any event, United States postal statutes and regulations prohibit the University from carrying unstamped employee organization material through its internal mail system.

Alternative Means of Communication

The University argues that it is reasonable to deny employee organizations access to the internal mail system because alternative means of communication exist.

In *Richmond Unified School District/Simi Valley Unified School District, supra*, and in a number of subsequent cases, the Board has considered the meaning of the term "reasonable regulation" as it appears in EERA subsection 3543.1(b) and HEERA section 3568. *Long Beach Unified School District* (5/28/80) PERB Decision No. 130, *Marin Community College District* (11/19/80) PERB Decision No. 145; *Regents of the University of California (Lawrence Livermore National Laboratory), supra*; *Regents of the University of California (UCLA*

⁷ We have previously held that the exercise of statutory access rights cannot be conditioned upon the payment of fees to an employer (*Regents of the University of California, Lawrence Livermore National Laboratory* (4/30/82) PERB Decision No. 212-H), and we so hold today.

Medical Center) (8/5/83) PERB Decision No. 329-H. Thus, after analyzing both federal cases concerned with the right of access under the NLRA and federal constitutional cases governing the right of access to public facilities, the Board concluded:

On the basis of our understanding of the statutory purposes of EERA, in conjunction with our review of analogous principles of labor and constitutional law, we conclude that school employer regulation under section 3543.1(b) should be narrowly drawn to cover the *time, place and manner of the activity*, without impinging on the content unless it presents a substantial threat to peaceful school operations. *Richmond Unified School District/Simi Valley Unified School District, supra*, at p. 19. (Emphasis added.)

Thus, while we have weighed the existence of other means of communication when determining whether access regulations are reasonable, we have only done so where the employer has introduced evidence that a particular means of access will cause "disruption" to the normal functioning of the employer's business and the rules "are narrowly drawn to avoid overbroad, unnecessary interference with the exercise of statutory rights." *Regents of the University of California (Lawrence Livermore National Laboratory), supra*, at p. 15.

In this case, the University makes no argument that permitting employee organizations to have access to the internal mail system will disrupt the functioning of the University, nor does it assert that its regulation is "narrowly drawn." Rather, it argues that the mere existence of other means of communication transforms its outright denial of the right to use the internal mail system into a "reasonable regulation." We do not agree. The means of access set forth in section 3568 are independent statutory rights and, therefore, the right of an employee organization to use any particular means of access may not be defeated simply because alternative means exist. Were this not the case, an employer could, for example, deny employee organizations the right to use "mailboxes" or "institutional facilities" merely because an adequate number of "bulletin boards" exist. Such was hardly the intention of the Legislature when enacting section 3568.

Undue Burden

Next, the University contends that affording employee organizations access to the internal mail system would cause an undue burden on the system.

In the original proposed decision, the ALJ found the University's contention that providing access would be unduly burdensome was "speculative at best," noting that, if access were not permitted, the UC mail system would still be required to deliver employee organization mail sent via the U.S. mails to various campus locations not serviced directly by the Postal Service. The ALJ also rejected the University's contention that access would cause delays in the delivery of mail. He noted that such delays occurred mainly at the central distribution center where mail is sorted for delivery to campus locations. AFSCME's practice had been to bypass the central location and place its communications directly in supervisors' boxes for distribution to custodians at various campus buildings.

At the supplemental hearing before ALJ Tamm, the University offered the testimony of Marvin Eckard, the supervisor of the Berkeley mail system, to establish that the system would be unduly burdened if employee organizations were permitted access to the system. Eckard testified that, in his opinion, if employee organizations were permitted access to the internal mail system, the result would be an increased burden on the system. Eckard admitted that if U.S. postage were affixed to incoming employee organization mail, the UC mail service would still have to deliver those materials no matter how burdensome delivery was on the system. However, he felt that because employee organizations would not have to bear the cost of postage if afforded access to the internal mail system, they would naturally tend to send a proportionally greater volume of mail through the UC system than they would if they were required to send that mail through normal postal channels. He cited no evidence to support this conclusion. Calvin Andre, a witness for the Charging Party and an employee of LLNL, testified that his organization would tend to send more communications if it did not have to pay postage costs. Weighing this evidence, ALJ Tamm concluded that:

The picture painted by Eckard generally supports a finding that any increase in mail would place additional burden on the system. Yet an increase in employee organization mail is no more burdensome than an increase in mail sent by any University department. Furthermore, if U.S. postage were affixed, all of the employee organization mail would be accommodated. It is therefore concluded that none of the new evidence demonstrated that employee organization mail would unduly burden the mail system.

The University argues that Tamm's conclusions fail to take into account the fact that, since the Postal Service delivers directly to 50 locations on the Berkeley campus, access to the internal mail system would automatically increase the burden on the system in terms of sorting, binding, and delivering mail.

We agree with the University that, to the extent that the Postal Service delivers directly to campus locations without the UC mail service having to handle that mail, any transfer of responsibility from the USPS to the UC mail service, would tend to add *some* burden to the UC mail system in terms of responsibility for processing that portion of the mail previously handled exclusively by the USPS. However, the mere fact that the University *might* have to process some unspecified additional amount of mail does not, ipso facto, prove that such an increase would be excessively burdensome.

The University's evidence to support its contention that employee organization access to the internal mail system would be excessively burdensome on the system is based entirely on the predictions of Marvin Eckard and Calvin Andre, who testified that, in their opinions, employee organizations would tend to send more communications through the internal mail system if it cost less than using the U.S. mails. In our view, opinion evidence of this sort is simply insufficient to establish that affording access to the internal mail system would so burden the system that it is reasonable to deny access altogether. Indeed, we fail to see how this evidence even establishes that affording access would cause a substantial increase in the volume of mail carried by the UC mail service.

Moreover, we find that the "floodgate" theory asserted by the University on appeal is unsupported by the record. There was no evidence introduced to show that, during the period of time when AFSCME Local 371 had been granted access to the University's internal mail system, an undue burden on the system resulted. On the contrary, the evidence demonstrates that the University's delivery of employee organization materials did not cause an appreciable increase in the volume of mail. Nor has the University introduced evidence that, in the period since it suspended the right of employee organizations to use the mail system, thus requiring those organizations affix postage to their letters, there has been a decrease in the volume of employee organization mail. In short, as the ALJ found, the University's contention that carriage of employee organization material will excessively burden the system is entirely speculative.

Similarly, because of the speculative nature of the University's argument, there is no convincing evidence that permitting employee organizations to have access to the internal mail system would create any additional financial burden on the University. It is undisputed that the University is required to process incoming U.S. mail free of charge *irrespective* of the volume of mail received.⁸ The record reflects that the UC mail system finances the cost of processing incoming U.S. mail through a budgetary allocation from the UC general fund. Thus, if employee organizations were required to send all mail to their members through the U.S. mails, UC would be required to bear the cost of processing that mail. If, on the other hand, employee organizations were permitted to use the internal mail system free of charge, the University would still be required to bear the processing costs out of its general fund. Thus, irrespective of the method of delivery, the University would be required to underwrite the cost of processing incoming employee organization mail.

⁸ The evidence does indicate that the U.C. mail service assesses individual University departments a surcharge for handling outgoing U.S. mail. Since employee organizations are not departments of the University, they would have no occasion to process outgoing U.S. mail through the University's internal mail system.

Only if it could be demonstrated that private carriage of employee organization mail has, in fact, created an undue burden on the internal mail system would we be inclined to look more favorably upon UC's argument. However, the University's decision to deny employee organizations any right whatsoever to use the internal mail system *before* it accumulated evidence of an increased burden on the system fundamentally undermines its position. Indeed, such is the risk any employer takes when it constructs rules of access which are overbroad.

Federal Postal Statutes and Regulations

* The University's main argument is that federal postal statutes and regulations prohibit it from carrying unstamped employee organization materials through its internal mail system and, therefore, its denial of access is reasonable. For the reasons set forth below, we reject the University's argument.

Article I, section 8, clause 7 of the United States Constitution authorizes Congress to establish "post offices and post roads." This provision of the Constitution has long been interpreted as giving the federal government a monopoly over the delivery of letters. *Associated Third Class Mail Users v. USPS* (D.C. Cir. 1979) 600 F.2d 84, cert. den. (1979) 444 U.S. 837; *National Association of Letter Carriers, AFL-CIO v. Independent Postal System of America, Inc.* (19th Cir. 1972) 470 F.2d 265; *Ex Parte Jackson* (1878) 96 U.S. 727; 21 Op. Att'y Gen. (1896). The "Private Express Statutes" (39 U.S.C. section 601-606; 18 U.S.C. section 1693-1699, 1724) generally prohibit the delivery of "letters" along "post routes" by anyone other than the United States Postal Service, but establish certain statutory exceptions to the Postal Service's monopoly over the delivery of letters. Pursuant to these statutes, the USPS has developed rules permitting private carriage of letters by individuals and entities. (39 C.F.R. 310 and 320.)

In this case, AFSCME seeks to have the University deliver various official union communications through its internal mail system. These communications include: (1) general notices of union activities; (2) union publications including newsletters; (3) materials concerning AFSCME's position on collective bar-

gaining and election issues; (4) notices of changes or modifications in University rules, regulations, and benefits affecting members of AFSCME; and (5) other materials generally concerned with the business of AFSCME and its members. To the extent that these communications are "letters" within the meaning of the Private Express Statutes and the regulations promulgated thereunder,⁹ they may be carried privately by the University only if carriage falls within one of the "exceptions" or "suspensions" established by 18 U.S.C. sections 1694 and 1696 and 39 C.F.R. sections 310.2 and 320. The only exceptions or suspensions that are relevant to this case are the "Private Hands Without Compensation" exception (39 C.F.R. 310.3(c)), the "Letters of the Carrier" exception (39 C.F.R. 310.3(b)), and the suspension for "certain letters of college and university organizations" (39 C.F.R. 320.4).¹⁰

The Private Express Statutes prohibit the private carriage of mail over "post routes." 18 U.S.C. section 1696(a). Title 39 CFR 310.1(d) defines "post routes" as "routes on which mail is carried by the U.S. Postal Service." the term "post routes" also includes any two places between which the mails are regularly carried. 18 U.S.C. section 1696(a); USPS Advisory Opinion PES 77-28.

The record establishes that at the Berkeley campus, the delivery routes of both the Postal Service and the University mail service are substantially similar, inasmuch as both organizations

⁹ "Letters" are comprehensively defined at 39 C.F.R. section 310.1. It is clear that, with the possible exception of union newsletters, all of the communications involved herein are "letters" within the meaning of the Private Express Statutes.

¹⁰ The other "exceptions" are for letters accompanying cargo (39 C.F.R. section 310.3(a)), letters sent by special messenger for a particular occasion (39 C.F.R. section 310.3(d)), and the private carriage of letters to a location where they then enter the mail stream (39 C.F.R. section 310.3(e)). The other "suspensions" are for certain data processing materials (39 C.F.R. section 320.2(a)), international-ocean carrier-related documents (39 C.F.R. section 320.5), extremely urgent letters (39 C.F.R. 320.6), and advertisements accompanying parcels or periodicals (39 C.F.R. section 320.7).

use most of the same surface streets. The Postal Service delivers directly to approximately 50 locations on the Berkeley campus and the UC mail service delivers to those same 50 locations, plus an additional 100 locations. When mail sent through the U.S. mails is addressed to a location not serviced by the Postal Service, delivery is made to a central campus location, and from that location it is carried to its final destination by the UC mail service. While it would be possible for the UC mail system to use routes not utilized by the Postal Service in order to deliver mail to those campus locations to which there is no direct delivery by the USPS, thereby avoiding "post routes" within the meaning of the Private Express Statutes, we find that such a requirement would place an impractical burden on the UC mail system. Accordingly, we find that delivery by the UC mail system at the Berkeley campus crosses postal routes, and private carriage, if permissible, must fall within one of the exceptions or suspensions of the Private Express Statutes set forth above.¹¹

Private Hands Without Compensation Exception

Title 18 U.S.C. section 1696(c) provides, in relevant part, that the Private Express Statutes "shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation. . . ." The regulation governing the Private Hands Without Compensation exception is codified at 39 C.F.R. section 310.3(c). It provides:

The sending or carrying of letters without compensation is permitted. Compensation generally consists of a monetary payment for services rendered. Compensation may also con-

¹¹ In contrast to the evidence concerning the Berkeley campus, it appears that at Lawrence Livermore National Laboratory, the USPS does not deliver to any area within the "secured area" of the Laboratory. Hence, private carriage of letters by the UC mail system within those areas of the Laboratory not serviced by the Postal Service would apparently be permissible since the internal mail system does not carry mail along USPS post routes. However, the unfair practice charge in this case concerns the Berkeley campus and we, therefore, need not determine at this time whether private carriage of letters at LLNL is permissible.

sist, however, of non-monetary valuable consideration and of good will. Thus, for example, when a business relationship exists or is sought between the carrier and its user, carriage by the carrier of the user's letter will ordinarily not fall under this exception; or, when a person is engaged in the transportation of goods or persons for hire, his carrying of letters "free of charge" for customers whom he does charge for the carriage of goods or persons does not fall under this exception.¹²

Both the courts and the Postal Service itself, consistent with the present wording of 39 CFR 310.3(c), have uniformly concluded that "compensation" may take either a monetary or non-monetary form.

In *United States v. Thompson* (1846) 28 F.Cas. 97, 98, the District Court of Massachusetts held that the exception did not permit a private carrier of merchandise to carry packages over postal routes "although no charge was made for letters as such." The Court based its finding that good will constituted "compensation" on the fact that the "tenor and scope [of the Act was] . . . to prevent such competition with the post office department."

Similarly, in 1896, the Attorney General concluded that the "express or implied obligation" between railroad lines to carry mail was "compensation." 21 Ops. U.S. Att'y Gen. 394, 401.

In Advisory Opinions PES 76-4 and 76-4 Reconsidered, the USPS determined that the Salem Oregon School District violated the Private Express Statutes when it delivered an employee

¹² Prior to October 11, 1979, 39 C.F.R. section 310.3(c) permitted "[t]he sending or carrying of letters *if no charge* for carriage is made by the carrier." (Emphasis added.) The regulation was modified to state that "compensation may also consist . . . of non-monetary valuable consideration and of good will." The Postal Service explained that the purpose of the regulation revision was

. . . to clarify, rather than to change, the Postal Service's established position, reflected in previous Advisory Opinions, that "compensation" could take the form of non-monetary valuable consideration and of good will. (See 43 Fed. Reg. 60615, 60618 (Dec. 28, 1978); Advisory Op. PES 76-4 Recon., p. 3.)

organization's mail without postage in accordance with the provisions of a collective bargaining agreement. The agreement provided that the school district could bill the employee organization for reasonable costs incurred, although, at the time the advisory opinion was issued, the District had waived collection of the fee. The USPS held that consideration arose not only from the express terms of the agreement, but from the very nature of the collective bargaining process itself. As such, private delivery of mail, whether charges were levied or not, was outside the Private Hands Without Compensation exception.¹³

Subsequently, in Advisory Opinion PES 76-17, the USPS reached the same conclusion with respect to the Detroit School Board's practice of carrying the letters of 14 unions to their members. In that case, the practice was based on an established policy of the school board, rather than on a collective bargaining agreement. The USPS found that the practice created:

. . . an established benefit for all of the unions whether or not set out in their collective bargaining agreements. Terms and conditions of employment include not only those specifically written into agreements, but also those which stem from the employment relationship and are mutually accepted by labor and management, even though not set out in agreements.

On July 2, 1982, in response to a request made by the University of California directly concerning the instant case and PERB's Order in Decision No. 183-H, the USPS issued its Advisory Opinion PES 82-9.

There, the Postal Service announced several positions which substantially depart from its previous opinions and which, as discussed *infra*, we find to be legally infirm.

First, the Postal Service further expanded the definition of "compensation," asserting that "compensation arises from the

¹³ The position of the Postal Service in Advisory Opinions 76-4 and 76-4 Reconsidered is presently being challenged before the United States District Court for the District of Columbia in *National Education Association v. Bolger*, Case No. 82-2320. As of the writing of this Decision, the court has not issued its decision.

employment relationship itself" even where the employee organization is not an exclusive representative. As the Postal Service explained:

The actual or hoped-for benefits to the employer-carrier may be conceived to exist in increased good will on the part of employees or their representatives, in the forbearance of demands for other benefits, or in the facilitation of a continuing relationship.

Whether or not it is expressed in these terms between the employer-carrier and the employee-shippers, we consider the reality of the situation to be that it is a service provided by the former in exchange for the latter's services. We think that this is equally true of an employee organization regardless of whether it stands in a formal, legally-recognized relationship with the employer. Adv. Op. PES No. 82-9, p. 5-6.

More significantly, the Postal Service directly considered the question of whether consideration was present where a state agency (i.e. PERB) had ordered an unwilling employer to carry employee organization mail as a matter of statutory right.

The Postal Service found that because the state furnishes a major portion of the University's income, consideration exists even where an administrative agency orders the University to carry the mail. Thus, the USPS found that:

... the state, through the appropriation of public funds, furnishes a major portion of the university's income. In so doing, it compensates the university for performing the duties which it instructs it to perform, including the carriage of the letters of employee organizations. ... Adv. Op. PES 82-9, at p. 6.

And, in a footnote, the Postal Service continued:

Our conclusion would not be different if we were to treat the state, rather than its instrumentality, the university, as carrier. In that situation, the employment relationship would exist directly between the members of the union and the state. Adv. Op. PES 82-9, at p. 6.

Thus, the Postal Service concluded that:

... it would be entirely inconsistent with the revenue-protection purpose of the Statutes to accept the principle that a duty imposed by statute is performed by "private hands without compensation." While the legislative purpose behind this exception is not clearly stated, it seems evident that it must have been intended to permit the gratuitous carriage of letters that may be voluntarily undertaken out of friendship.

Since the carriage contemplated here is in no sense a gratuitous act, we conclude that the "Private hands without compensation" exception does not apply. Advisory Opinion PES 82-9, p. 6.

Hence, in Advisory Opinion PES 82-9, the Postal Service took the position that "compensation" within the meaning of the Private Express Statutes and regulations exists in the instant case, even where it is conceded that no "consideration," in either a monetary or in a non-monetary form, passes between the primary parties to the relationship (i.e. between the University as carrier of mail and the Union as the sender of the mail). Rather, the Postal Service found that consideration may be found in any situation where the carrier is in some way "compensated" by an outside source for the carriage of mail. Since the internal mail system is funded by the Legislature, any cost incurred as a result of PERB's order is "compensated" by a legislative appropriation.

As the Court of Appeals noted in its remand decision, the official interpretation of statutes and regulations by a federal agency, though not controlling, is entitled to great deference. *Udall v. Tallmann* (1965) 380 U.S. 1 [13 L.Ed.2d 616]; *Zenith Radio Corp. v. United States* (1978) 437 U.S. 443; *Udall v. USPS* (2d Cir. 1973) 480 F.2d 4; *Wilkinson v. Workers Comp. Appeals Board* (1975) 19 Cal.3d 491. The administrative determinations of this agency are entitled to a similar level of deference. *San Mateo City School District, et al. v. PERB* (1983) 33 Cal.3d 850; *Moreno Valley Unified School District v. PERB* (1983) 142 Cal.App.3d 191. For this reason, the Court of Appeal remanded the instant case to the Board to determine whether the Private

Express Statutes and the access provisions of HEERA could be harmonized.

The Postal Service's position, that "compensation" need not be monetary and may take other forms, is clearly consistent with the Private Express Statutes and regulations. However, we find that the Postal Service's position, as articulated for the first time in Advisory Opinion 82-9, that the Private Hands Without Compensation exception is inapplicable where the private carriage of letters is ordered as a matter of statutory right by an administrative agency, is unsupportable in two respects: first, it erroneously assumes that the assertion of statutory access rights under HEERA causes consideration to pass between the employer and the employee organization, and is inconsistent with the plain meaning of the term "consideration" as set forth in the Postal Service's own implementing regulation; second, it concludes that private carriage of employee organization mail undertaken as a result of an administrative agency's order is "compensated" merely because the University's internal mail system is funded by the State Legislature.

The Postal Service's first contention fundamentally misconstrues the nature of statutory access rights as they traditionally exist in labor relations legislation. HEERA, like EERA, SEERA, and the National Labor Relations Act, grants employee organizations access and representational rights which exist independent of the collective bargaining process. See *Richmond Unified School District/Simi Valley Unified School District*, *supra*; *Long Beach Unified School District*, *supra*; *Marin Community College District*, *supra* (EERA); *Regents of the University of California, UCLA Medical Center*, *supra*, *Regents of the University of California (Lawrence Livermore National Laboratory)*, *supra* (HEERA); *State of California (Department of Corrections)*, *supra* (SEERA); *Republic Aviation Corporation*, *supra* (NLRA). Thus, for example, employee organizations need not negotiate with an employer in order to have the right to distribute leaflets to employees, use employees bulletin boards, or to represent them in grievances. Employee organizations possess access rights irrespective of whether they are exclusive representatives or, as in this case, nonexclusive representatives. Since the right of

access is a statutory right, it exists whether the employer and the employee organization have a formal, informal, good, bad, or no relationship at all. Thus, access rights are not, as the Postal Service suggests in Advisory Opinion 82-9, gained as a result of the "forebearance of demands for other benefits" or "granted" by an employer with an intent to increase "good will" or "facilitate a continuing relationship" with an employee organization. Such rights, therefore, may be distinguished from those which arise solely from the collective bargaining process, and which are created as a result of the exchange of consideration between the parties to an agreement. Hence, the Postal Service is simply incorrect, and, indeed, beyond its area of expertise, when it finds that the assertion of statutory access rights causes consideration to flow between an employee organization and an employer.

Moreover, the Postal Service's view that consideration is present whenever an employee organization avails itself of its statutory access rights is inconsistent with the common law definition of the term "consideration" and the whole thrust of the law of contracts. Thus, it is a fundamental precept of the common law that "neither the promise to do, nor the actual doing of that which a promisor is by law . . . bound to do, is . . . consideration." 14 Cal. Jur.3d 304; *Moore v. Bartholomae Corp.* (1945) 69 Cal.App.2d 474; *Bailey v. Breetwor* (1962) 205 Cal.App.2d 287 [23 Cal.Rptr. 740]; *Henry v. Lake Mill Lumber Co.* (1956) 139 Cal.App.2d 620 [293 P.2d 909]; *Schaadt v. Mutual Life Ins. Co.* (1906) 1 Cal.App.2d 238 [29 Cal.Rptr. 750].¹⁴ Simply stated, where a legal obligation already exists between the parties, no consideration passes between them when one party undertakes to perform its preexisting duty—in this case the statutory obligation imposed upon the University by section 3568 of HEERA to afford em-

¹⁴ See also, California Civil Code section 1605, which defines consideration as:

Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is *not lawfully entitled*, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor. . . . (Emphasis added.)

ployee organizations access to its internal mail system. Thus, PERB's order would not cause "consideration" to flow between the parties affected by that order.

Nor do we agree with the Postal Service's position, as articulated in Advisory Opinion 82-9, that the University would be "compensated" within the meaning of the Private Express Statutes for its carriage of employee organization mail simply because its internal mail system is funded by a legislative appropriation.

In every Postal Advisory Opinion construing the Private Hands Without Compensation exception other than advisory Opinion 82-9¹⁵, it is explicitly stated that consideration must arise from the relationship between the carrier and the sender. As the Postal Service stated in Advisory Opinion PES 76-15, at p. 3:

The Postal Service has consistently held that the Private Hands without compensation exception does not apply in a situation in which the carriage of letters, although ostensibly performed without compensation, is nevertheless offered because of a business or other economic relationship between the carrier and those for whom he carries letters. [Citations omitted]. In each case, it was determined that *the relationship between the parties gave rise to a form of consideration flowing to the carrier*, which made the exception inapplicable. (Emphasis added.)

Similarly, when determining that free carriage of employee organization mail by the Detroit School Board was compensated, the Postal Service stressed the consideration flowing between the parties to an ongoing economic relationship:

[T]he delivery services rendered for the unions clearly constitute a term or condition of employment, in the form of a consideration to the unions. In return for this and other considerations, the Detroit School Board *receives legal consideration from the unions*, namely, the services of the persons whom the unions represent, and also the good will of the unions. Accordingly, we believe that the element of

¹⁵ See, e.g., Advisory Opinions 76-4, 76-9, 76-12, 76-15, 76-17, 77-8.

consideration is present in this case. (Emphasis added.) Adv. Op. 76-17.

In Advisory Opinion 82-9, however, the Postal Service found that here the State, rather than the employee organization, would provide compensation to the University for carriage of mail.

Indeed, the Postal Service's theory, as articulated in Advisory Opinion 82-9, would foreclose application of the Private Hands without Compensation exception in *any* situation where an entity other than a private individual agrees to carry mail. After all, any institution which agrees to carry mail without charge on behalf of another person or institution must fund from its own assets the operational costs of such carriage. Where the entity is public, its funding will inevitably derive from a legislative or other tax-based source.¹⁶ Therefore, under the Postal Service's interpretation, even if a public institution agrees to carry the mail purely out of gratuitous friendship, the "compensation" it would receive in the form of budgetary allocations would preclude application of the Private Hands exception.¹⁷ Thus, the Postal Service's interpretation in Advisory Opinion 82-9 would render the Private Hands exception virtually meaningless.

The University asserts that, while access rights in this case are asserted as a matter of statutory right, at some future point when an exclusive representative is selected, the parties might seek to negotiate the right to use internal mail systems. Hence, at that time, consideration might inure to the University as a result of the process of reaching a collective bargaining agreement with the

¹⁶ Where the institution is private, of course, the source of funding will be derived from a private source (i.e., corporate assets).

¹⁷ Compare, however, Advisory Opinion PES 77-8, where the USPS found that the Private Hands Without Compensation exception was applicable to the decision of the Indianapolis School Board to carry food stamp circulars on behalf of a community organization, notwithstanding the fact that implicit in the school board's agreement to carry the circulars was a decision to underwrite the cost of delivery. To the extent that the School Board received revenue from a legislative body, its agreement to carry mail would be "compensated" in a manner indistinguishable from this case.

exclusive representative. Although the Board has held that access rights are negotiable (*Healdsburg Union High School District and Union School District/San Mateo City School District* (1/5/84) PERB Decision No. 375), such negotiations only concern the time, place, and manner of access. As discussed above, the employee organization is not required to negotiate in order to assert its basic statutory right of access. Indeed, as in this case, the employee organization need not be an exclusive representative to assert its statutory access rights. Thus, in our view, the assertion of the basic right of access is independent of the collective bargaining process.

In sum, the Postal Service's position, as articulated in Advisory Opinion 82-9, is contrary to the plain meaning of its own implementing regulations and a well-reasoned approach to the law of contracts and labor relations. We, therefore, conclude that the carriage of Union materials through the University's internal mail system falls within the Private Hands Without Compensation exception and, as such, is not prohibited by the Private Express Statutes.

Letters of the Carrier Exception

Title 18 U.S.C. section 1594 provides:

Whoever, having charge or control of any conveyance operating by land, air or water, which regularly performs trips at stated periods on any post route, or from one place to another between which the mail is regularly carried, carries, otherwise than in the mail, any letters or packets, except such as relate to some part of the cargo of such conveyance, *or to the current business of the carrier*, or to some article carried at the same time by the same conveyance, shall, except as otherwise provided by law, be fined not more than \$50. (Emphasis added.)

The implementing regulation of the Letters of the Carrier exception is set forth at 39 C.F.R. section 310.3(b). It provides:

(1) The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the individual actually carrying the letters is not the person

sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person (see section 310.3(b)(2)) and the letters must relate to the current business of such person.

(2) The fact that the individual actually carrying the letters may be an officer or employee of the person sending the letters or to whom the letters are addressed for certain purposes does not necessarily mean that he is an officer or employee for purposes of this exception. The following factors bear on qualifications for the exception: the carrying employee is employed for a substantial time, if not full time (letters must not be privately carried by casual employees), the carrying employee carries no matter for other senders, the carrying employee is a regular salaried employee and shares in all privileges enjoyed by other regular employees (including employees not engaged primarily by the letter carrying function), including but not limited to salary, annual vacation time, absence allowed for illness, health benefits, workmen's compensation insurance, and retirement benefits.

(3) Separately incorporated carriers are separate entities for purposes of this exception, regardless of any subsidiary, ownership, or leasing arrangement. When, however, two concerns jointly operate an enterprise with joint employees and share directly in its revenues and expenses, either of the concerns may carry the letters of the joint enterprise.

Generally, the Letters of the Carrier exception permits a person or entity to deliver its own letters to another address or to pick up letters addressed to it from another person or entity. Where the carrier is an institution rather than an individual, letters addressed to its employees must concern the "current business" of that institution. In other words, the Letters of the Carrier exception does not permit an employer to carry personal letters addressed to its employees. See Advisory Opinions PES 74-22, 76-12, 76-14; 76-17, 82-16.

In Advisory Opinion PES No. 76-4, Reconsidered (1/15/82), *supra*, the Postal Service determined that the Letters of the

Carrier exception is inapplicable to the carriage of union mail through a school district's internal mail system. In the opinion of the Postal Service, the exception was not applicable because letters addressed to employees in their capacity as members of an employee organization did not concern the "current business" of the carrier school district. As the Postal Service stated:

We think it clear that interrelated though their activities and goals may be, the District and the Association are legally distinct entities in every sense, the Association's letters to its members can in no sense be regarded as sent by or addressed to the carrier-District, and the exception is therefore inapplicable.¹⁸

In Advisory Opinion 82-9, relying on its rationale in Advisory Opinion 76-4 Reconsidered, the Postal Service determined that the Letters of the Carrier exception did not apply to the facts of this case, since employee organization materials were not related to the "current business" of the University of California.

In our view, the position of the Postal Service applies an altogether too limited view of what constitutes the "current business" of the University of California. The purpose of HEERA is to ensure "the development of harmonious and cooperative labor relations between the public institutions of higher education and their employees." (HEERA subsection 3560(a)). Section 3565 of the Act affords employees the right to "form, join, and participate in the activities of employee organizations." It requires higher education employers to meet and confer with non-exclusive representatives (*California State University, Sacramento* (4/30/82) PERB Decision No. 211-H) and to negotiate with exclusive representatives over all matters within the scope of representation. (Section 3570). Employees have a right to file grievances and employee organizations have a right to represent employees in those grievances. (Section 3567; *The Regents of the University of California (Berkeley)* (5/16/83) PERB Decision

¹⁸ See also Ad. Op. 76-17, where the Postal Service held that employee organization letters do not relate to the current business of the school board carrier, but, rather, to the current business of the union with which the school board deals.

No. 308-H.) It is an unfair labor practice for employers to interfere with these rights or otherwise discriminate or coerce employees in retaliation for the exercise of such rights. (Section 3571.) Hence, it is our opinion that the Legislature, by enacting a comprehensive system of collective bargaining for higher education employees of the State of California, has determined that labor relations matters *are* the "current business" of the University.

Moreover, the few court decisions which have considered the Letters of the Carrier exception have held that, where an interdependent relationship exists between the parties to a business relationship, the exception may apply notwithstanding the fact that they are separate entities.

In *United States v. Erie Railroad Co.* (1914) 235 U.S. 513 [59 L.Ed. 335], the U.S. Supreme Court held that the Letters of the Carrier exception applied to the carriage of letters for a telegraph company by a railroad pursuant to an agreement between the two companies. In determining that the exception applied, the Court stated:

[W]hile the companies in many respects are independent, they are also, in some respects, at least, dependent. . . . [W]hile it may be said that there is a railroad business in which the telegraph company has no concern, that is, business distinctly railroad, yet it is also so far concerned with the telegraph business as to make its efficient and successful operation of interest to it.

In *United States v. Southern Pacific Co.* (D.C. Az. 1928) 29 F.2d 433, a District Court concluded that the "Letters of the Carrier" exception (as codified at 18 U.S.C. section 307 (1926)) did not apply to the carriage of letters by the Southern Pacific Company for another independent corporation, the Southern Pacific Company of Mexico. Because the two companies operated independently of each other and did not share a "direct interest," the Court held that, unlike the *U.S. v. Erie Railroad Co.* case, the letters of the Mexico line could not be considered those of the carrier Southern Pacific Company.

Thus, these cases support the view that the Letters of the Carrier exception may apply to two independent entities where carriage would enhance a relationship in which each has a "direct interest." In this case, as noted above, such an interdependent relationship is created by the very nature of a collective bargaining statute like HEERA.

We conclude that, by affording employee organizations the right to use the internal mail facilities of higher education employers, the Legislature has evidenced an intent to make labor relations matters the "current business" of the University. Accordingly, we find that the Letters of the Carrier exception applies to the carriage of employee organization letters through the internal mail system of the University of California.

Suspension of Private Express Statutes for Certain University Organizations

Title 39 CFR section 320.4 provides that the operation of the Private Express Statutes

... is suspended on all post routes to permit colleges and universities to carry in their internal mail systems the letters of their bona fide student or faculty organizations to campus destinations. This suspension does not cover the letters of faculty members, students, or organizations other than bona fide student or faculty organizations of the college or university. Colleges and universities choosing to provide their student or faculty organizations access to their internal mail systems are responsible for assuring that only letters of bona fide student or faculty organizations addressed to campus destinations are carried. (See section 310.4) For purposes of this suspension, "internal mail systems" are those which carry letters on, between, and among the various campuses of a single college or university and operate in accordance with the Letters of the carrier exception in 39 CFR 310.3(b).

This suspension of the operation of the Private Express Statutes was added in 1979 (44 Fed. Reg. 52835). Although it has had no judicial application, it has been the subject of discussion in several USPS Advisory Opinions.

In Advisory Opinion 76-4 Reconsidered, *supra*, the Postal Service rejected the assertion that this suspension was applicable to the delivery of union mail in a school district. In rejecting this contention, the Postal Service commented on the purpose of the rule:

In the Notice of Proposed Rulemaking which preceded issuance of the Suspension for certain letters of college and university organizations (43 F.R. 60615-23, December 28, 1978), we emphasized that while some student and faculty organizations—those which would be affected by the existence of the suspension—are not legally part of the university, they frequently are regarded as "performing important functions in the operation of the academic community," and "often supported in a number of ways by the college or university proper." It was this type of university organization, such as the school newspaper or intramural sports league, that the Postal Service had in mind when it issued the suspension. Again, in the absence of the suspension only the letters of organizations legally a part of the university could be carried without restriction. Our purpose was to avoid making distinctions among campus organizations based on circumstances, primarily independent incorporation, which are largely immaterial to their functioning as part of the life of the campus. Ad. Op. 76-4 Recon., at p. 11.

Thus, the purpose of the rule is to permit the use of the internal mail system by organizations which are not legally part of a college or university and, therefore, not able to avail themselves of the "Letters of the Carrier" exception, but which are recognized as "performing important functions in the operation of the academic community."

In Advisory Opinion 82-9, *supra*, the Postal Service concluded that union mail could be carried in the internal mail system under this suspension only to the extent that a union was considered a "bona fide faculty organization." As the Postal Service explained:

In PES No. 76-4 Reconsidered, where we concluded that the suspension does not apply to the carriage by school districts of labor union materials, we explained that the suspension

was designed to cover only student and faculty organizations because they are at the "core of 'university community' organizations." We noted that the suspension might cover the carriage of faculty union materials "only by virtue of the breadth of the term 'faculty organizations' and not because faculty unions are 'truly an integral part of the life of the university.'" Ad. Op. PES 82-9, at p. 8.

Since, in this case, AFSCME represents non-faculty employees, the Postal Service concluded that it was not a "faculty organization" within the meaning of the suspension.

It appears, therefore, that at the present time, the Postal Service has not ruled out the possibility that a labor organization representing faculty members at a college or university could use the internal mail system under the suspension. It does, however, seem to require that the organization represent faculty members and not other employees.

In *University of Missouri at Columbia-National Education Association v. Dalton, et al.* (W.D. Mo. 1978) 456 F.Supp. 985, the Court held, inter alia, that a university violated the equal protection clause of the Fourteenth Amendment of the U.S. Constitution by denying a labor union access to its internal mail system based on its conclusion that only organizations which "enhanced" the university would be permitted such access. Citing numerous United States Supreme Court decisions, the Court determined that it was unconstitutional for the university to discriminate in favor of one type of employee organization against another.

Similarly, we cannot see how it is constitutionally permissible for the Postal Service to promulgate a regulation which distinguishes between a labor organization which represents "faculty members" and one which represents other categories of employees. We, therefore, conclude that the Postal Service's determination that the suspension does not apply to an employee organization which represents non-teaching employees of the University is, at the very least, constitutionally suspect and not entitled to the deference ordinarily owed to its opinions. Accordingly, we find that the suspension should apply to employee

organizations which represent nonfaculty employees as well as faculty members.

CONCLUSION

We have found that section 3568 of HEERA entitles AFSCME to use the internal mail system at the University of California, Berkeley. In addition, we have found that private carriage of employee organization materials through the University's internal mail system does not conflict with the federal Private Express statutes and regulations. Accordingly, we find that the University's regulation prohibiting employee organization access to its internal mail system is unreasonable within the meaning of section 3568. Thus, we find that the University violated subsection 3571(a) and, derivatively, subsection 3571(b) of the Act by denying AFSCME Local 371 access to its internal mail system and shall order the University to permit AFSCME Local 371 to have access to the internal mail system.

However, because we recognize that affording employee organizations access to the internal mail system might result in some additional burden on the system, we shall order the University to meet with AFSCME to discuss a system of presorting, binding or partial delivery of mail.¹⁹

Further, we note that the University has expressed concern that, in the past, the internal mail system has utilized supervisory employees to deliver employee organization materials. While we agree with the University that an employer has the right to require that its supervisory employees maintain neutrality with respect to the organizational activities of rank and file employees (*State of California Department of Forestry*) (9/21/81) PERB

¹⁹ For example, the record indicates that in the past, AFSCME officials had delivered mail directly to various campus buildings, where they were delivered to employees by supervisory employees. This method of delivery bypassed the UC mail system's central distribution center where, the record establishes, most delays in the system have occurred.

Decision No. 174-S), we do not see how the mere carriage of mail by supervisory employees will affect their neutrality.²⁰

ORDER

Based on the foregoing Decision and the entire record in this matter, the Public Employment Relations Board hereby ORDERS that the University of California shall:

A. CEASE AND DESIST FROM:

1. Denying AFSCME its rights under the Higher Education Employer-Employee Relations Act by refusing it access to the internal mail system;

2. Denying employees their rights under the Higher Education Employer-Employee Relations Act by refusing employee organizations access to its internal mail system.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Grant AFSCME access to its internal mail system for the purpose of communicating with employees of the University of California. Use of the mail system shall be without charge.

2. Meet with AFSCME to consider means by which any burden which may be caused by delivery of its mail through the internal mail system may be ameliorated. The parties are directed to consider such actions as presorting, prebinding, or centralized drop-off of mail. Such rules shall be reasonable, shall not defeat the right of employees to receive communications from employee organizations, and are subject to approval of the Regional Director consistent with subpart B(4) of this Order.

3. Within 35 days of the date that this Decision is no longer subject to reconsideration, post at all work locations where notices

²⁰ However, the University is always free to restructure its mail system so as to utilize nonsupervisory employees to carry employee organization materials, so long as reassignment of personnel does not interfere with the access rights established by this Decision.

to employees are customarily placed, copies of the Notice attached as an Appendix hereto. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that such Notices are not reduced in size, altered, defaced or covered by any other material.

4. Within 35 days of the date this Decision is no longer subject to reconsideration, report to the San Francisco Regional Director of the Public Employment Relations Board of the actions taken to comply with this Order. Report thereafter to the Regional Director in accordance with her instructions.

Members Morgenstern and Burt joined in this Decision.

Appendix

Notice to All Employees
 Posted by Order of the
 Public Employment Relations Board
 An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-4-H, *William H. Wilson v. University of California, Berkeley*, in which all parties had the right to participate, it has been found that the University of California violated the Higher Education Employer-Employee Relations Act, Government Code subsections 3571(a) and (b) by denying employee organizations the right to use its internal mail system.

As a result of this conduct, we have been ordered to post this notice and we will:

A. CEASE AND DESIST FROM:

1. Denying the American Federation of State, County, and Municipal Employees, Local 371 its rights under the Higher Education Employer-Employee Relations Act by refusing access to the University's internal mail system;

2. Denying employees their rights under the Higher Education Employer-Employee Relations Act by refusing employee organizations access to the University's internal mail system.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Grant AFSCME access to the internal mail system for the purpose of communicating with employees of the University of California. Use of the mail system shall be without charge.

2. Meet with AFSCME to consider means by which any burden which may be caused by delivery of its mail through the internal mail system may be ameliorated. The parties are directed to consider such actions as presorting, prebinding, or centralized drop-off of mail. Such rules shall be reasonable and shall not defeat the right of employees to receive communications from employee organizations.

Dated:

University of California, Berkeley

By _____,
 Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE DEFACED, ALTERED, REDUCED IN SIZE OR COVERED BY ANY OTHER MATERIAL.

Appendix 5

State of California
Public Employment Relations Board

Case No. SF-CE-4-H

William H. Wilson,
Charging Party,

vs.

University of California (Berkeley),
Respondent.

PERB Decision No. 183a-H

Remand

On March 18, 1983 the Public Employment Relations Board (hereafter PERB) remanded the above-referenced case to the Chief Administrative Law Judge to conduct a hearing for purposes of taking additional evidence and preparing findings of fact and conclusions of law based on that evidence.

Pre-hearing conferences were held on March 30 and April 6, 1983. A formal hearing was held April 8, 1983. The transcript was prepared and briefs were received. The case was submitted for decision on May 10, 1983.

In its remand decision the PERB instructed the Chief Administrative Law Judge to solicit evidence as to the following questions but not limited thereto:

1. To what extent are the materials charging party seeks to distribute "letters" within the meaning of the federal postal regulations?
2. What compensation, if any, does the University receive for delivery of employee organizational materials?
3. What relationship, if any, exists between the University's mail system and United States postal routes?
4. Does the University utilize its mail system to disseminate management material pertinent to employer-employee relations?

5. Does the University permit the use of its mail system by charitable and other nonemployee organizations?

6. What burden, if any, would be placed on the University's mail system if it were made available to employee organizations?

At the hearing the parties presented evidence only on the issues raised by the Board in its remand order. Based on this evidence, the undersigned makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Question #1. The document which gave rise to this charge was a one-page notice regarding a union nomination meeting. Charging party, however, also seeks to send the following through the campus mail system.

- a. General notices of union activities including meetings, meet and confer sessions and other concerted activities.
- b. Union publications including newsletters having to do with union-related activities.
- c. Materials concerning Local 371's position on the benefits of collective bargaining and the rights of employees protected under the collective bargaining laws, including union-related election materials, information and advice.
- d. General notices of changes or modifications in University rules, regulations and benefits affecting members of Local 371.
- e. Other materials generally concerned with the business of Local 371 and members thereof.

These materials would be addressed to individual employees at particular locations. It is not contemplated, however, that Local 371 would use the University mail to send to individual employees communications which are concerned only with business of those individual employees unless there was no other means of contacting them.

Question #2. The University has consistently refused to deliver employee organization materials, therefore, no new evidence

was received regarding compensation for delivery of such materials.

Evidence was received regarding charges imposed by the University upon various University departments and units for use of the mail system. In this regard the Berkeley campus is unique to the University system. At every campus except Berkeley,¹ units or departments that utilize the intra-campus² mail system are recharged for that service. There is no recharge at Berkeley. The recharge system at other campuses is as follows. At some campuses each unit or department that receives intra-campus mail gets charged a monthly rate, depending upon volume. For example, each unit that receives from 0 to 500 pieces of mail per day would be charged a certain monthly rate, while those receiving over 500 pieces per day would be charged a higher monthly rate. Some campuses measure volume in terms of outgoing mail, others by incoming mail, while still others use a combination of both. Some campuses measure volume by the weight of the mail rather than the number of pieces of mail. Another method is to charge a "drop charge." This is a flat fee per month just for having mail dropped within the department. This has nothing to do with the volume of mail handled for that department.

At the time of the hearing the entire cost of handling intra-campus mail on the Berkeley campus was funded by general state funds through the mail division's annual budget. Marvin Eckard, the manager of the mailing division at the Berkeley campus, testified that he was in the process of developing a method of charging departments but that nothing had yet been instituted on the Berkeley campus.

¹ The record was unclear what recharges were made at the Lawrence Livermore National Laboratory (hereafter LLNL).

² Intra-campus mail is mail delivered through the internal campus mail system. This requires no U.S. postage. This should be distinguished from mail being sent outside the campus confines known as inter-campus or outside mail. This inter-campus or outside mail does require U.S. postage. On the Berkeley campus all mail being sent to other Northern California campuses is delivered via University couriers and is therefore still considered intra-campus mail, not requiring U.S. postage.

On all campuses, including Berkeley, the user of inter-campus or outside mail requiring U.S. postage is charged for the postage plus a surcharge. All users are also charged for special services such as bulk processing.

Question #3. Evidence was received regarding overlap of postal routes and the University mail system on the Berkeley campus and LLNL.

On the Berkeley campus, the U.S. postal service picks up and delivers directly to over 50 locations. The University mail system also services each of those locations served by the postal service. The University system delivers mail to approximately 100 additional locations which do not receive direct delivery from the postal service. Maps outlining the two delivery routes demonstrate that the University, by necessity, utilizes most of the same surface streets within and around the University which are utilized by the postal service.

Regarding the LLNL, there was testimony that the postal service does not deliver to any location within the secured area of the Laboratory. There was also testimony that a small percentage of LLNL employees work at sites outside the secured area. Mail to those sites would therefore be carried on surface streets. There was no evidence showing those surface streets were also used by the postal service for delivery of mail.

Question #4. The parties stipulated that certain materials were sent by management to rank-and-file employees via the internal mail system on the Berkeley campus. Among those materials was a publication of the Berkeley campus personnel office entitled "U.C. Employee." Within that publication there were, among other things, articles regarding bargaining units, PERB elections, improvement to personnel services offered, benefits increases, job freezes, salary increases, vacations, and special performance awards. Many of these articles not only report objective facts but also offer the views of the personnel office on the subject.

Charging party also entered evidence as to the LLNL. At that site a publication titled "Tuesday A M Update" is distributed via the mail system. Within that management publication were articles regarding bargaining units, collective bargaining training

of supervisors, public sector strikes, amendments to unit petitions, summaries of grievance cases, PERB elections, union authorization cards, declining union membership, unfair practice charges, and many others offering management views on employer-employee relations issues.

Question #5. The only example of charitable and other non-employee organization use of the mail system on the Berkeley campus was the United Way campaign discussed in the earlier administrative law judge's decision. The only new evidence regarding this issue was that in 1982 the procedure for distributing the United Way letters and materials was changed so that they are now distributed to United Way representatives in a group meeting. The letters and materials are then hand-carried by representatives to their departments and then distributed to employees. Representatives who cannot attend the meeting are asked to pick up their department's letters and materials from a central office. Those that are not picked up are then sent to the United Way representatives through the campus mail.

Charging party offered evidence from the LLNL to show that in November 1979 an organization called the Lawrence Livermore Laboratory Women's Association (hereafter Women's Assoc.) was allowed to send notices of a meeting and a newsletter through the internal mail system at LLNL. Additionally, in February 1983 the Bank of America was allowed to use the mail system to distribute instruction and application information for an automated teller which had been installed at the LLNL facilities. The information from the bank was preceded a day earlier by an administrative memo from the LLNL business services unit explaining that an automated teller had been installed on the facility for use by LLNL employees. The memo also informed employees that representatives from the bank would be at LLNL for the following week to answer questions and assist employees with the machine operation.

Charging party also introduced an October 1979 memo from the LLNL compensation/benefits unit. That memo notified employees of services offered employees by Crocker Bank. The memo instructed employees that further information was available at the employee benefits section.

Marvin Eckard testified that if the materials from the bank and the Woman's Assoc. had been mailed at the Berkeley campus they would not have been delivered because it would have constituted a violation of University policy.

Question #6. To prove that distributing employee organization mail would create a burden, the University offered testimony of Marvin Eckard. This testimony reflected budget cuts, reductions in workforces and increases in the amount of mail required to be processed.

Eckard testified that in his opinion the number of mailings of employee organizations would increase if organizations had free access to the system, thus putting a greater burden on the system. This was supported by testimony of Calvin Andre, a witness for the charging party. Andre testified that his organization would utilize the system more heavily if it didn't have to pay postage.

Eckard did admit, however, that if U.S. postage was affixed, the University would have no choice but to accommodate the employee organization mail.

CONCLUSIONS

Question #1. Federal postal regulations generally define a "letter" to be a message directed to a specified person or address which is recorded in or on a tangible object.³ There are, however, exceptions to this definition. Newspapers, periodicals and signs or posters which are primarily intended to be posted for reading by more than the addressee are not considered letters.

Although there may be occasions where the charging party's materials fall within an exception to the definition of letters, the majority of the mailings would be addressed to individual employees and would therefore be considered letters within the postal regulations.

Question #2. Because the University has refused to deliver employee organization materials it has received no compensation for doing so. At Berkeley where the instant case arose, University

³ 39 CFR Part 310, section 310.1.

users are not charged for intra-campus mail service. If inter-campus or outgoing mail requires U.S. postage, the users are charged for the postage plus surcharge. Users are also charged for special services such as bulk processing. At every other campus in the system, and possibly at LLNL,⁴ University users of the system are charged for the intra-campus mail service.

Question #3. Postal regulations define postal routes in part as "routes on which mail is carried by the postal service."⁵ This includes public roads and letter carrier routes as established for the collecting and delivering of mail. The University and U.S. postal service pick up and deliver to 50 identical locations creating virtually complete overlaps of routes used. Although the University services an additional 100 locations, the routes used also substantially overlap U.S. postal routes.

Question #4. As also found by the administrative law judge in the original hearing, articles and newsletters disseminated to employees by management via the University mail system do include management positions on issues pertinent to employer-employee relations.

Question #5. On the Berkeley campus, the University does not allow use of the internal mail system by charitable or other non-employee organizations. The only evidence of this ever happening was when the United Way was allowed to use the mail system under the direct sponsorship of the chancellor's office.

At LLNL, the University has allowed outside organizational use of the mail system as evidenced by the 1983 mailing of the Bank of America and the 1979 mailings of the Women's Assoc. There was no testimony that these mailings were under the direct sponsorship of the University. It is therefore found that at LLNL the University has, on at least three occasions between 1979 and the present, allowed use of the mail system by non-employee organizations. The 1979 mailing regarding Crocker Bank was sent by a department of LLNL, and therefore is not evidence of use of the mail system by an outside organization.

⁴ Eckard was unaware of the practice at LLNL.

⁵ 39 C.F.R. sec. 310.1(d).

Question #6. The picture painted by Eckard generally supports a finding that any increase in mail would place additional burden on the system. Yet an increase in employee organization mail is no more burdensome than an increase in mail sent by any University department. Furthermore, if U.S. postage were affixed all of the employee organization mail would be accommodated. It is therefore concluded that none of the new evidence demonstrated that employee organization mail would unduly burden the mail system.

These recommended findings of fact and conclusions of law regarding the new evidence submitted are being forwarded directly to the Board itself for its consideration, together with the existing record.

DATED: June 2, 1983

/s/ JAMES W. TAMM

James W. Tamm

Administrative Law Judge

Appendix 6

State of California
Decision of the Public Employment Relations Board

Case No. SF-CE-4-H

PERB Decision No. 183a-H

March 18, 1983

William H. Wilson,
Charging Party,

vs.

University of California at Berkeley,
Respondent.

Appearances: Andrew Thomas Sinclair, Attorney for William H. Wilson; Donald L. Reidhaar, James N. Odle, Susan M. Thomas, Attorneys for Regents of the University of California.

Before Gluck, Chairperson; Jaeger and Morgenstern, Members.

DECISION

GLUCK, Chairperson: The Public Employment Relations Board (PERB) issued its Decision No. 183-H on November 25, 1981, finding that the University of California unlawfully denied charging party the use of its internal mail system to distribute organizational material to employees of the University. The University appealed this decision to the First District Court of Appeal, arguing that United States postal regulations prohibit free use of the mail system by employee organizations. The Court issued its decision on February 17, 1983, vacating the PERB Order and remanding the case to the Board to determine, *inter alia*, the "reasonableness of the University's regulations" in light of the federal postal regulations.¹

¹ *Regents of the University of California v. Public Employment Relations Board* (1st Dist. Feb. 17, 1983) ____ CA3d ____ (1 Civil No. 54414).

The Board, therefore, remands the matter to the Chief Administrative Law Judge to conduct a hearing for the purpose of taking additional evidence as to whether the University's regulations concerning the use of its internal mail system by employee organizations are reasonable within the meaning of section 3568 of the Higher Education Employer-Employee Relations Act.²

The Chief Administrative Law Judge will solicit evidence as to the following, but not limited thereto:

(1) To what extent are the materials charging party seeks to distribute "letters" within the meaning of the federal postal regulations?

(2) What compensation, if any, does the University receive for delivery of employee organizational materials?

(3) What relationship, if any, exists between the University's mail system and United States postal routes?

(4) Does the University utilize its mail system to disseminate management material pertinent to employer-employee relations?

(5) Does the University permit the use of its mail system by charitable and other nonemployee organizations?

(6) What burden, if any, would be placed on the University's mail system if it were made available to employee organizations?

The Chief Administrative Law Judge shall give this matter priority and, upon completion of the hearing, shall forward the case record together with recommended findings of fact and conclusions of law directly to the Board itself for its consideration together with the existing record, in determining the issue remanded.

It is so ORDERED.

Members Jaeger and Morgenstern joined in this Decision.

² Codified at Government Code section 3560, et seq.

Appendix 7

[Civ. No. 54414. First Dist., Div. One. Feb. 17, 1983.]

The Regents of the
University of California,
Petitioner,

vs.

Public Employment Relations Board,
Respondent;

William H. Wilson et al.,
Real Parties in Interest.

SUMMARY

In a proceeding before the Public Employment Relations Board (PERB) based upon the claim by an employee of the University of California and a public employees' union that the university was committing an unfair labor practice under certain provisions of the Higher Education Employer-Employee Relations Act (HEERA) (Gov. Code, §§ 3568, 3571), by refusing to permit the union to distribute organizational literature to the university's custodial employees through the intercampus mail system, the PERB declined to decide the question whether the claimed statutory right was unenforceable by reason of preemptive federal postal law. The PERB issued an order compelling the university to grant the union access to the university's internal mail service.

The Court of Appeal vacated the PERB's order and remanded the matter for further proceedings. The court held that PERB properly declined to determine whether the claimed statutory right was unenforceable by reason of preemptive federal postal law, since Cal. Const., art. III, § 3.5, precludes administrative agencies from declaring a statute unconstitutional or unenforceable on grounds of federal preemption unless an appellate court has made a determination that such statute is unconstitutional or unenforceable. However, the court held that the right granted

under HEERA to use institutional mailboxes for union purposes is subject to "reasonable regulations" (Gov. Code, § 3568). Since the PERB did not decide the factual issue whether the university's regulations denying union access to the internal mail system were reasonable in light of all the surrounding circumstances, including federal postal requirements, the court remanded the matter to the PERB for such a determination; Cal. Const., art. III, § 3.5, does not prevent the PERB from consulting federal law in order to determine whether the state statute could be enforced without offending relevant federal regulations. (Opinion by Racanelli, P. J., with Elkington and Newsom, JJ., concurring.)

OPINION

RACANELLI, P.J.—We granted a writ of review to consider the propriety of an order issued by the Public Employment Relations Board (PERB) compelling the employer, the Regents of the University of California (University), to grant an employee organization access to the University's internal mail service. For the reasons discussed below, we remand for findings on a remaining material factual issue.

FACTS

In 1979, William H. Wilson and Local 371 of the American Federation of State, County and Municipal Employees filed an unfair labor practice charge against the University before the PERB asserting that the University's refusal to permit the union to distribute organizational literature to the University's custodial employees through the intercampus mail system violated the rights guaranteed to employee organizations and employees under the provisions of the Higher Education Employer-Employee Relations Act (HEERA), reproduced in relevant part in the margin.¹

¹ The statutes provide in pertinent part:

Government Code section 3568: "Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to

The charge arose against the following background: The University maintains two operational units for its mail system at Berkeley. Mail collection and delivery for the Berkeley campus, nearby University state-wide offices and intercampus mail for the northern California campuses and laboratories are handled by the Harmon Gym facility at Berkeley. There, the outgoing mail is separated into three groups: (1) prestamped mail; (2) internal University mail for northern California; and (3) other mail.

The prestamped mail is delivered immediately to the United States Postal Service (U.S.P.S.) without further handling by the University. Internal University mail is monitored to assure that only official business mail is involved. This nonposted mail is then sorted and delivered.

Other mail is then taken to a second unit, denoted "2000 Carleton." These pieces are rated, affixed with United States postage and delivered to the U.S.P.S. Senders are recharged by office or department at regular postage rates plus 25 percent.

Incoming mail to the University from the U.S.P.S. is handled in one of two ways: mail addressed to any of some 50 sites on the Berkeley campus is delivered to the site by the U.S.P.S.; other United States mail, not so addressed, is delivered to Harmon Gym where delivery is completed by University employees.

In summary, the only mail accepted for delivery within the University's internal mail system is either posted mail which comes to Harmon Gym from the U.S.P.S. or official University business mail. The University has adopted regulations which deny use of its internal mail system to non-University organizations or

use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act."

Government Code section 3571: "It shall be unlawful for the higher education employer to:

"(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

"(b) Deny to employee organizations rights guaranteed to them by this chapter."

for political, commercial or social purposes. Employee organizations are expressly prohibited from using the internal mail service. Pursuant to these regulations, the University has refused to deliver mail tendered by the union relating to its organizational activities unless the mail is stamped and sent through the U.S.P.S. It is that refusal which forms the basis of the union's unfair practice charge.

After a hearing, the PERB hearing officer issued a written decision in favor of the union. Upon the University's appeal to the board, the PERB essentially affirmed the hearing officer's decision and ordered the University to allow free access to the intercampus mail system.² The University then petitioned for review of the order.

I

Section 3568 of the Government Code grants to employee organizations the "right to use institutional bulletin boards, *mail-boxes* and other means of communication..." (*italics added*), the exercise of which is expressly "[s]ubject to reasonable regulations."

The University's regulations prohibit the use of the University's internal mail system by non-University groups or for nonbusiness purposes and, as previously mentioned, expressly deny access to employee organizations. These regulations were promulgated by

² The order in relevant part provided: "it is found that the University of California at Berkeley has violated subsections 3571(a) and (b) of the Higher Education Employer-Employee Relations Act by denying the American Federation of State, County and Municipal Employees, Local 371, access to the University's internal mail system at the Berkeley campus. It is hereby ORDERED that the University and its representatives shall:

"(1) CEASE AND DESIST FROM:

"(a) Denying employee organizations access to its internal mail system for the purpose of communicating with employees;

"(b) Interfering with employees' rights to participate in employee organization affairs by receiving communications from such organizations."

the University in an effort to comply with federal postal laws and regulations, which, in effect, prohibit private conveyance of mail over any established U.S.P.S. route. (18 U.S.C. §§ 1693-1699, 1724; 39 U.S.C. §§ 601-606; 39 C.F.R. §§ 310, 320.)³ An advisory opinion rendered by the assistant general counsel of U.S.P.S. concludes that "Carriage by the University in its internal mail distribution system of the letters of a union seeking to represent the University's custodial employees, without payment of postage, is prohibited by the [federal] Private Express Statutes." Of course, such an official interpretation by the federal agency itself, while not controlling, is entitled to great deference. (*Udall v. Tallman* (1965) 380 U.S. 1 [13 L.Ed.2d 616, 85 S.Ct. 792]; see also *Wilkinson v. Workers' Comp. Appeals Bd.* (1975) 19 Cal.3d 491, 501 [138 Cal.Rptr. 696, 564 P.2d 848].)

(1) The University's chief complaint is that PERB failed to consider the Hobsonian choice confronting the University: if it were to grant the union access to its internal mail system under the union's interpretation of the HEERA provisions, it runs the risk of violating federal postal laws. With implicit reliance upon article III, section 3.5⁴ of the California Constitution, the hearing

³ The few exceptions listed under the regulations include: (1) letters properly stamped (39 U.S.C. § 601; 39 C.F.R. § 310.2(b)); (2) letters carried by the same person sending or receiving them (or an employee) (39 C.F.R. § 310.3(b)); (3) where the carriage is without compensation (39 C.F.R. § 310.3(c)); or (4) the carriage is by a university in its internal mail system of letters of bona fide faculty or student organizations (39 C.F.R. § 320.4).

⁴ Article III, section 3.5, added by the voters in 1978, provides: "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

"(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

"(b) To declare a statute unconstitutional;

"(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made

officer as well as the PERB concluded that the latter was powerless to resolve the apparent conflict between the HEERA provisions and the federal postal laws and regulations. The recently enacted constitutional proviso, adopted by the electorate in apparent response to the majority holding in *Southern Pac. Transportation Co. v. Public Utilities Com.* (1976) 18 Cal.3d 308 [134 Cal.Rptr. 189, 556 P.2d 289] (see Ballot Pamp. arguments, Prop. 5, Primary Elec. (June 1978) explicitly precludes any administrative agency (which by definition includes the PERB) from declaring a statute unenforceable or refusing to enforce a statute on grounds of federal prohibition in the absence of a reviewing court's antecedent determination. (See generally *Goldin v. Public Utilities Commission* (1979) 23 Cal.3d 638, 669, fn. 18 [153 Cal.Rptr. 802, 592 P.2d 289]; see also *Lewis-Westco & Co. v. Alcoholic Bev. etc. Appeals Bd.* (1982) 136 Cal.App.3d 829, 840, fn. 12 [186 Cal.Rptr. 552]; *Fenske v. Board of Administration* (1980) 103 Cal.App.3d 590, 595 [163 Cal.Rptr. 182].) In view of such constitutional compulsion, we agree that the PERB properly declined to decide the question whether the claimed statutory right to use the internal mail system is unenforceable by reason of preemptive federal postal law. Unquestionably, that decision rests solely within the province of the judiciary (*Fenske v. Board of Administration, supra*, at p. 595) and in this instance within the jurisdiction of an appellate court. (Cal. Const., art. III, § 3.5, subd. (c).)

But because we believe a threshold issue remains to be decided, i.e., whether the state statute (Gov. Code, § 3568) and the federal postal laws and regulations can be harmonized, the unsettled question of conflicting legislation is presented prematurely and consequently need not now be reached. As noted, the right granted under HEERA to use institutional mailboxes for union purposes is subject to "reasonable regulations." (Gov. Code, § 3568.) Thus, a factual issue remains to be decided by the PERB, namely: whether the University's regulations denying union access to the internal mail system are reasonable in light of all the surrounding circumstances, including federal postal re-

a determination that the enforcement of such statute is prohibited by federal law or federal regulations." (Italics added.)

quirements.⁵ However, we find nothing in the language of article III, section 3.5 which prevents the PERB from *consulting* federal law in order to determine whether the state statute may be enforced without offending relevant federal regulations. An administrative agency still remains free to *interpret* the existing law in the course of discharging its statutory duties. (See *Goldin v. Public Utilities Commission, supra*, 23 Cal.3d 638, 669, fn. 18; cf. *McLean Trucking Co. v. U.S.* (1944) 321 U.S. 67, 79-80 [88 L.Ed. 544, 552-553, 64 S.Ct. 370].) Therefore, we remand the matter to the PERB for a determination of the reasonableness of the University's regulations.⁶

The order below is vacated and the matter is remanded for further proceedings consistent with the views expressed herein.

Elkington, J., and Newsom, J., concurred.

On March 8, 1983, the opinion was modified to read as printed above.

⁵ In making that determination, the PERB may properly consider circumstances emphasized in this writ proceeding but yet to be evaluated: e.g., the University's use of its mail system to disseminate an employee newsletter expressing management's views on labor-management issues; the University's distribution of literature through the internal mail system soliciting charitable contributions deemed official business under the auspices of the chancellor; the union's access to other means of communicating with custodial employees; the burden which would be placed on the University's internal mail system.

⁶ Finally, the union's request that we take judicial notice of a related but different grievance proceeding filed with respect to the Livermore Laboratory must be and is denied.

Appendix 8

Court of Appeal of the State of California
for the First Appellate District
Division: 1

Case No. A014446
Old No. CIV54414
San Francisco.

Reidhaar, Donald L. & Thomas, Susan
2200 University Avenue
Berkeley, CA 94720

Regents of University of California
vs.

Public Employment Relations Board
Wilson, William H. et al

REMITTITUR

I, Clifford C. Porter, Clerk of the Court of Appeal of the State of California, for the First Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on 02/17/83 and that this opinion or decision has now become final.

_____ Appellant _____ Respondent to recover costs
_____ each party to bear own costs
 x costs are not awarded in this proceeding

Witness my hand and the seal of the
court affixed at my office this
Apr 20 1983

Clifford C. Porter, Clerk

By
Deputy

Appendix 9

[Letterhead]

United States Postal Service
475 L'Enfant Plaza, SW
Washington, DC 20260

July 2, 1982

PES No. 82-9

James N. Odle, Esq.
Associate Counsel
Office of the General Counsel
The Regents of the University
of California
590 University Hall
2200 University Avenue
Berkeley, CA 94720

Dear Mr. Odle:

This responds to your letter requesting the opinion of the Postal Service as to the applicability of the Private Express Statutes to the carriage of the letters of a labor union by the University of California in its internal distribution system.

Facts: The University of California maintains nine campuses in the State of California: at San Diego, Irvine, Riverside, Los Angeles, Santa Barbara, Santa Cruz, Berkeley, San Francisco, and Davis. The University also manages three major laboratories for the Department of Energy: the Lawrence Berkeley National Laboratory at Berkeley, California; the Lawrence Livermore National Laboratory at Livermore; and the Los Alamos National Laboratory at Los Alamos, New Mexico. In addition, the University operates several hundred research and public service facilities throughout California and employs approximately 90,000 people in the state.

Each campus and Lawrence Livermore National Laboratory maintains an internal mail distribution system for the delivery, without U.S. postage, of mail which pertains to the business of

the University and which is sent to and from locations within the University. These campus and Laboratory distribution systems are linked by inter-campus systems. Mail between one of the five southern California campuses and one of the six northern California campuses or Laboratories (north-south mail) is accumulated in a pouch and U.S. postage is paid on the pouch. Once a pouch has been delivered, e.g., to the Berkeley campus, the letters within it are distributed through the campus' internal mail system without the payment of additional postage. Apart from north-south mail, internal mail from one campus to another is delivered through the University's internal mail system, e.g., from Davis to Santa Cruz or from San Diego to Santa Barbara, without payment of any U.S. postage.

The campus mail system also delivers, to specific locations within the campus, mail from outside the University on which United States postage has been paid. For example, the United States Postal Service delivers mail directly to approximately 50 locations on the Berkeley campus. Incoming U.S. mail which is not addressed to one of these locations is picked up by campus mail carriers from the Berkeley post office early each morning, taken to the campus mail distribution center, and sorted by department name for campus delivery. Along with intra-University mail, it is then delivered to the departments on a regular schedule. In the fiscal year from July 1978 to July 1979, the Berkeley campus mail distribution system processed almost 13,000,000 pieces of mail.

During October 1979, a local of the American Federation of State, County and Municipal Employees (AFSCME) which seeks recognition as bargaining representative of approximately 280 custodians of the Berkeley campus requested to use the University's internal distribution system without payment of postage to deliver its material to university employees. When the University refused this request, the union filed an unfair labor practice charge with the state Public Employment Relations Board. The Board held that the University's action was a violation of section 3568 of the California Government Code, interpreting the portion of that section which gives employee organizations "the right to use . . . other means of communication" as including

the right to use, without payment of postage, the University's internal distribution system.

Question: May the University carry the letters of AFSCME without payment of postage?

Discussion: The Private Express Statutes are a group of Federal civil and criminal laws (18 U.S.C. §§ 1693-1699, 1724; 39 U.S.C. §§ 601-606) which generally prohibit the carriage of the letters of one person by another over post routes without payment of the postage which would be paid on those letters if carried by the Postal Service. The Statutes are interpreted and implemented by Postal Service regulations, 39 C.F.R. Parts 310 and 320.

The Private Express Statutes do not define "letter." The Postal Service defines the term in 39 C.F.R. § 310.1(a) as a message—information or intelligence—directed to a specific person or address and recorded in or on a tangible object. For the purposes of this discussion, we will assume that the organizational literature of AFSCME constitutes "letters" as defined by this provision.

Post routes include, but are not limited to, public roads, highways, and letter-carrier routes. 39 C.F.R. § 310.1(d). We understand that the Postal Service delivers mail directly to approximately 50 locations on the Berkeley campus, which indicates the presence of a substantial network of post routes. This distinguishes the Berkeley campus from those self-contained college and university campuses, not intersected by post routes, where the Postal Service delivers to only one central location. We assume, therefore, that the materials in question would necessarily be carried on "post routes."

The Postal Service has concluded on a number of occasions that the carriage by an employer of the letters of an organization of its employees is on its face a violation of the Statutes and is not justified by any of the statutory exceptions to their general prohibition. In PES No. 76-4, we considered a situation in which the collective bargaining agreement between the Salem Education Association and the Salem, Oregon School District, entered into in accordance with state law, provided for the carriage of

Association communications directed to District employees by means of the District's interschool distribution system. The agreement provided for reimbursement by the Association of costs incurred by the District in performing this service. Although no payments were actually made, the District did not relinquish its right to seek reimbursement.

Although we considered the possibility that carriage by the District might come within the statutory exemption to the prohibition for carriage by "private hands without compensation," 39 C.F.R. § 310.3(c), we concluded that it did not. We noted that the provision obligating the District to carry the Association's letters was one among a number in an agreement of the kind reached by the give and take of bargaining and that to obtain that provision the Association might have foregone raising some other issue. We stated:

We believe it reasonable to hold that for purposes of the Private Express Statutes and regulations, compensation exists when, as in this case, the delivery of letters is performed in accordance with a contractual agreement between the sender and the carrier pursuant to which the carrier has the legal right to charge even though the agreement predominantly relates to matters other than the delivery services.

Subsequently in PES No. 76-17, we reached the same conclusion with respect to the practice of carrying the letters of 14 unions to their members by the Detroit School Board. In that instance, the practice was based on an established policy of the Board, rather than on a specific provision of a collective bargaining agreement. It appears to have been referred to in an agreement with the Detroit Federation of Teachers, but not in agreements with other unions. We found the practice to be

an established benefit for all of the unions whether or not set out in their collective bargaining agreements. Terms and conditions of employment include not only those specifically written into agreements, but also those which stem from the employment relationship and are mutually accepted by labor and management, even though not set out in agreements. Accordingly, the delivery services rendered for the unions

clearly constitute a term or condition of employment, in the form of a consideration to the unions. In return for this and other considerations, the Detroit School Board receives legal consideration from the unions, namely, the services of the persons whom the unions represent, and also the good will of the unions. Accordingly, we believe that the element of consideration is present in this case.

This position was recently reaffirmed in our Opinion on Reconsideration of PES No. 76-4. There we dealt at some length with the argument that our initial opinion had incorrectly interpreted the *Private hands without compensation* exception. We pointed out that an amendment to 39 C.F.R. 310.3(c) which had been adopted since the rendering of the initial opinion stated our interpretation of the exception somewhat more clearly. Effective October 11, 1979, that exception was amended to read in pertinent part as follows:

The sending or carrying of letters without compensation is permitted. Compensation generally consists of a monetary payment for services rendered. Compensation may also consist, however, of non-monetary valuable consideration and of good will. Thus, for example, when a business relationship exists or is sought between the carrier and its user, carriage by the carrier of the user's letters will ordinarily not fall under this exception;

...

The current wording of the exception and the precedent underlying its inclusion, then, clearly render the Association's claim that no monetary consideration is paid for carriage inadequate in and of itself to trigger the exception. When, as here, the carriage of letters is performed by one party to an ongoing economic relationship for the benefit of another party, we consider that that act simply cannot realistically be isolated from the context of the relationship and characterized as being performed "without compensation." The 1979 amendment to the regulation merely gives express recognition to the fact that in the business world compensation can take the form of non-monetary consideration or good will.

The substance of these opinions then is that where an employment relation exists between the carrier and the sender of letters, the carriage cannot be said to be without compensation.

The circumstance which you present, however, differs from those addressed in the Advisory Opinions in that the organization seeking to have its letters carried is not recognized as the bargaining agent of the employees as were the organizations in the previous opinions. In this instance, moreover, the carriage is not voluntarily undertaken by the university but is an obligation said to be imposed upon it by state law.

That the employee organization seeking to have its letters carried by the university is not a certified bargaining agent does not cause us to pause long. We have previously concluded that compensation arises from the employment relationship itself. The actual or hoped-for benefits to the employer-carrier may be conceived to exist in increased good will on the part of employees or of their representatives, in the forbearance of demands for other benefits, or in the facilitation of a continuing relationship. Whether or not it is expressed in these terms between the employer-carrier and the employee-shippers, we consider the reality of the situation to be that it is a service provided by the former in exchange for the latter's services. We think that this is equally true of an employee organization regardless of whether it stands in a formal, legally-recognized relationship with the employee.

Of greater novelty, in terms of our precedents, is the fact that the carriage is not willingly undertaken by the university but is said to be an obligation imposed on it as a public employer by state law. This circumstance, we think, makes it clear that the carriage arises from the employment relationship. Language found in the California Higher Education Employer Employee Relations Act supports this conclusion. Section 3560(e) of the California Government Code provides:

It is the purpose of this chapter to provide the means by which relations between each higher education employer and its employees may assure that the responsibilities and authorities granted to the separate institutions under the Con-

stitution and by statute are carried out in an atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them.

Even apart from the employment relationship, however, we consider that the delegation by the state to its agency of a statutory duty to carry letters would be in conflict with the applicability of the *Private hands without compensation* exception. First, the state, through the appropriation of public funds, furnishes a major portion of the university's income. In so doing, it compensates the university for performing the duties which it instructs it to perform, including the carriage of the letters of employee organizations.¹

Second, apart from the apparent anomaly of a public agency being thought of as "private hands," we consider that it would be entirely inconsistent with the revenue-protection purpose of the Statutes to accept the principle that a duty imposed by statute is performed by "private hands without compensation." While the legislative purpose behind this exception is not clearly stated, it seems evident that it must have been intended to permit the gratuitous carriage of letters that may be voluntarily undertaken out of friendship.

Since the carriage contemplated here is in no sense a gratuitous act, we conclude that the "Private hands without compensation" exception does not apply.

We have also considered the possible application of the statutory exemption for *Letters of the carrier*, 39 C.F.R. § 310.3(b), and have determined that it does not apply to these circumstances.

The *Letters of the carrier* exception permits an employer to deliver his own letters on his own current business by means of his own employees. Under this exception, an employee of the Univer-

¹ Our conclusion would be no different if we were to treat the state, rather than its instrumentality, the university, as carrier. In that situation, the employment relationship would exist directly between the members of the union and the state.

sity who meets the qualifications set out in § 310.3(b)(2) may carry without payment of postage letters sent by or addressed to members of the staff or faculty in their official capacity as representatives of the employer University. It is this exception which permits the University's current use of an internal distribution system for mail pertaining to its business which is sent to and from locations within the University.

We have previously held that the *Letters of the carrier* exception does not apply to the carriage by an employer of the personal letters of employees (PES No. 76-14), nor does it apply to the carriage by a University's employees of the personal letters of faculty members or students (PES No. 76-12). In both instances our conclusions were based on determinations that the letters were neither sent by or addressed to the carrier nor did they relate to the current business of the carrier. We have also concluded, in the school district context, that the exception does not apply to the carriage by the school board of union materials destined for employees of the school district. In PES No. 76-17, we stated that the unions' letters do not relate to the current business of the school board (the carrier) but, rather, to the current business of the unions with which the board deals. In PES No. 76-4 Reconsidered, where we dealt with the possible applicability of the exception to the carriage of the materials of a teacher's association by the school district, we rejected an argument that the association's letters were "intimately connected" to the business of the school district because part of the district's business is the conduct of employee relations. We stated:

We think it clear that inter-related though their activities and goals may be, the District and the Association are legally distinct entities in every sense, the Association's letters to its members can in no sense be regarded as sent by or addressed to the carrier-District, and the exception is therefore inapplicable.

Further, we found this conclusion supported by provisions of state law defining unfair labor practices in the area of public sector employment. We reasoned that:

A general principle underlying all labor relations legislation of which we are aware is the maintenance of a wholly

independent, arms-length relationship between the employer and the actual or prospective representative of its employees. The School District as employer in this context can in no sense be considered an originator of materials directed by the employee representative to its membership.

For the same reasons, we find that the union materials at issue cannot be considered letters of the University, and we conclude, therefore, that the *Letters of the carrier* exception does not apply in this instance.

Finally, we have determined that the *Suspension for certain letters of college and university organizations*, 39 C.F.R. § 320.4, does not apply to the University's carriage of these union materials. That section suspends the operation of the statutes so as to permit "colleges and universities to carry in their internal mail systems the letters of their *bona fide* student or faculty organizations to campus destinations" even though such carriage may occur over "post routes." The suspension was intended to cover the letters of student and faculty organizations which serve the campus community but which technically are not a part of the university itself, and, therefore, are not eligible for the *Letters of the carrier* exception. In the Notice of Proposed Rulemaking which preceded issuance of this suspension (43 F.R. 60615-23, December 28, 1978) we explained that our reason for accommodating these organizations is that while they "are not legally part of the college or university, they often are recognized as performing important functions in the operation of the academic community." We further stated that the suspension is "not intended to cover such things as . . . letters of outside organizations."

In PES No. 76-4 Reconsidered, where we concluded that the suspension does not apply to the carriage by school districts of labor union materials, we explained that the suspension was designed to cover only student and faculty organizations because they are at the "core of 'university community' organizations." We noted that the suspension might cover the carriage of faculty union materials "only by virtue of the breadth of the term 'faculty organizations' and not because faculty unions are 'truly an integral part of the life of the university.'"

Since AFSCME, a union seeking to represent the University's custodial employees, is neither a student nor a faculty organization, we must conclude that the suspension is inapplicable by its terms to the carriage of its letters by the University.

Conclusion: Carriage by the University in its internal mail distribution system of the letters of a union seeking to represent the University's custodial employees, without payment of postage, is prohibited by the Private Express Statutes.

Sincerely,

/s/ CHARLES D. HAWLEY
Charles D. Hawley
Assistant General Counsel
General Administrative
Law Division
Law Department

Appendix 10

State of California
Decision of the
Public Employment Relations Board

Case No SF-CE-4-H
PERB Decision No. 183-H
November 25, 1981

William H. Wilson,
Charging Party,

vs.

University of California at Berkeley,
Respondent.

Appearances: Andrew Thomas Sinclair, Attorney (Sinclair & Clancy) for William H. Wilson; Susan M. Thomas, Attorney for Regents of the University of California at Berkeley.

Before Gluck, Chairperson; Jaeger and Moore, Members.

DECISION

The instant case comes before the Public Employment Relations Board (hereafter Board or PERB) on exceptions taken by the University of California at Berkeley (hereafter University) to the proposed hearing officer's decision. In that decision, the hearing officer determined that William H. Wilson, as an individual and on behalf of the American Federation of State, County and Municipal Employees, Local 371 (hereafter AFSCME), sustained its charge that the University violated subsections 3571(a) and (b) of the Higher Education Employer-Employee Relations Act (hereafter HEERA or Act) and dismissed AFSCME's allegation with regard to subsection 3571(d).¹

¹ The HEERA is codified at Government Code section 3560 et. seq. All statutory references hereafter are to the Government Code unless otherwise indicated.

Subsections 3571(a), (b) and (d) provide:

It shall be unlawful for the higher education employer to:

AFSCME did not submit exceptions to the hearing officer's dismissal of the allegation regarding subsection 3571(d) of the Act, and we therefore make no ruling on this charge.

The Board has reviewed the record and concludes that the hearing officer's procedural history and findings of fact as set forth in the proposed decision, attached hereto, are free from prejudicial error and are adopted by the Board itself.² Further, we affirm the hearing officer's conclusions of law as modified below.

DISCUSSION

In accordance with the hearing officer's determination, we find that section 3568 of HEERA³ entitles AFSCME to use of the University's internal mail system. The University may not insist

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another, provided, however, that subject to rules and regulations adopted by the board pursuant to Section 3563, an employer shall not be prohibited from permitting employees to engage in meeting and conferring or consulting during working hours without loss of pay or benefits.

² In its exceptions, the University correctly identifies certain inaccuracies in the hearing officer's recitation of the facts. We find, however, that the factual summary is free from prejudicial error.

³ Section 3568 provides:

Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act.

that organizational material be stamped and sent through the United States Postal Service. We note that the University has expressed concern regarding the fact that, as currently maintained, the internal mail system utilizes supervisors to distribute mail. An employer has the right to protect itself against potential charges that its supervisory personnel are engaged in organizational activities or rendering assistance to an employee organization. Further, an employer may, as a matter of policy, require its supervisory employees to maintain its neutrality with respect to organizational activity. (*State of California (Department of Forestry)* (9/21/81) PERB Decision No. 174-S.) We conclude that an employer is permitted to structure its internal mail system in order to avoid conduct which may be prohibited by the Act. Thus, while we do not depart from our ruling that AFSCME is entitled to utilize the University's internal mail system, the University may devise, consistent with its statutory obligations, an alternative method of mail distribution which will not require supervisory employees to deliver the organizational materials.

ORDER

Based upon the foregoing facts, conclusions of law and the entire record in this case, it is found that the University of California at Berkeley has violated subsections 3571(a) and (b) of the Higher Education Employer-Employee Relations Act by denying the American Federation of State, County and Municipal Employees, Local 371, access to the University's internal mail system at the Berkeley campus. It is hereby ORDERED that the University and its representatives shall:

(1) CEASE AND DESIST FROM:

- (a) Denying employee organizations access to its internal mail system for the purpose of communicating with employees;
- (b) Interfering with employees' rights to participate in employee organization affairs by receiving communications from such organizations.

(2) TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS NECESSARY TO EFFECTUATE THE POLICIES OF THE ACT:

(a) Within five (5) workdays of date of service of this decision, post copies of the Notice, as set forth and attached hereto in the Appendix, at its headquarters office and in all locations on the Berkeley campus where notices to employees are customarily placed. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps should be taken to insure that said Notices are not reduced in size, altered, defaced or covered by any other materials; and

(b) At the end of thirty-five (35) workdays from date of service of this Decision, notify the San Francisco regional director of the Public Employment Relations Board in writing of the action the University has taken to comply with this Order.

It is further ordered that the alleged violation of subsection 3571(d) of the Act is DISMISSED.

/s/ BARBARA D. MOORE
By: Barbara D. Moore, Member

/s/ JOHN W. JAEGER
John W. Jaeger, Member

/s/ HARRY GLUCK
Harry Gluck, Chairperson

Appendix

Notice to Employees
Posted by Order of the
Public Employment Relations Board
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-4-H in which both parties participated, it has been found that the University of California at Berkeley violated subsections 3571(a) and (b) of the Higher Education Employer-Employee Relations Act by unreasonably denying the American Federation of State, County and Municipal Employee, Local 371, use of the University's internal mail system for the purpose of communicating with employees on the Berkeley campus. As a result of this conduct, we have been ordered to post this Notice by the Public Employment Relations Board. We will:

CEASE AND DESIST FROM:

1. Denying employee organizations access to the University internal mail system for the purpose of communicating with employees on the Berkeley campus, and
2. Interfering with employees' rights to participate in employee organization affairs by receiving communications from such organizations.

Dated: _____

University of California at Berkeley

By: _____
Authorized Agent of the
University

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

Appendix 11

State of California
Public Employment Relations Board

Unfair Practice
Case No. SF-CE-4-H
William H. Wilson,
Charging Party,

vs.

University of California at Berkeley,
Respondent.

Proposed Decision
(6/17/80)

Appearances: Andrew Thomas Sinclair, Attorney (Sinclair & Clancy) for William H. Wilson; Susan M. Thomas, Attorney for Regents of the University of California at Berkeley.

Before: Gerald A. Becker, Hearing Officer.

PROCEDURAL HISTORY

On November 16, 1979, William H. Wilson, as an individual and on behalf of the American Federation of State, County and Municipal Employees, Local 371, (hereafter Charging Party or Local 371) filed this unfair practice charge against the University of California at Berkeley (hereafter University). As subsequently amended, the charge alleges that the University violated Government Code sections 3568, 3571(a), (b) and (d)¹ by prohibiting the Charging Party from distributing organizational literature through the mail system in the Department of Facilities Management.

The hearing in this matter was held before the undersigned on January 28, 1980, and the matter was submitted for decision on April 30, 1980.

¹ All statutory references are to the Government Code unless otherwise specified.

FINDINGS OF FACT

The University maintains internal, centralized mail services for academic, staff and systemwide offices. Services provided by the Berkeley campus mail section include delivery of interdepartmental, inter-campus and incoming U.S. mail to campus departments. It also collects outgoing interdepartmental, inter-campus and U.S. mail.

The U.S. Postal Service delivers U.S. mail directly to approximately 50 locations on the Berkeley campus. Incoming U.S. mail which is not delivered directly is picked up by campus mail carriers from the Berkeley post office early each morning. It then is taken to the campus mail section (the main campus distribution center) and sorted by department name for campus delivery. Along with intra-campus mail, it then is delivered to the departments on a regular schedule.

Inter-campus mail must be stamped. However, no U.S. postage is paid for internal University mail on the Berkeley campus nor is there a recharge against University department or office budget for use of this mail system. Rather, the mail system is funded through the University budget. In fiscal year 1978-79, the campus mail system processed almost 13 million pieces of mail with a budget of \$213,000. The budget for fiscal year 1979-80 was reduced to \$180,000. Also fewer employees are working in the campus mail system than in 1978-79.

Except for the delivery of incoming U.S. mail, University policy provides that campus mail services are for official University use only. Outside individuals and organizations are not allowed to use campus mail services. If an outside organization attempts to use the campus mail system for a distribution on campus of such things as political literature or commercial advertisements, the campus mail system notifies the sender that the mail will not be processed.

Since 1967, University policy also has prohibited employee organizations from using the campus mail system to communicate with employees. However, through unfamiliarity with this University policy, it was not enforced in the Berkeley campus custodial services department.

Prior to January 1979, the central custodial office had mailboxes for individual campus buildings. The building leader (in charge of all custodians in a particular campus building) would pick up the mail for his building and distribute it to the custodians working there.

After January 1979, the main custodial office was moved to a different location. There now are mailboxes only for custodial supervisors, who are the next step up from building leaders in the line of supervision and may supervise custodial services for as many as 15 campus buildings. Since January 1979, custodial supervisors have picked up and distributed mail for the buildings under their supervision, bypassing the building leaders.

Both before and after January 1979, building leaders and then supervisors distributed unstamped mail from employee organizations. However, on May 18, 1979, Robert Gilmore, senior superintendent of physical plant and manager of custodial services, attended a collective bargaining orientation meeting presented by the University for supervisory personnel. At this meeting he learned it was a violation of University policy to allow use of the University mail system by employee organizations. He then held a supervisors' meeting and told his custodial supervisors not to deliver mail from employee organizations unless it is regular stamped, U.S. mail.

Sometime after July 1, 1979, after the Higher Education Employer-Employee Relations Act (hereafter HEERA)² became effective, Local 371 attempted to distribute organizational literature through the custodial supervisors as it previously had done. The organization was told that supervisors could not deliver the mail unless it had a U.S. stamp on it. Mr. Wilson then recovered the mail and he and other custodians attempted to deliver the literature personally to custodians at the various campus buildings. It took Mr. Wilson about three hours to cover ten buildings himself. Not all buildings where custodians work received the literature.

² Government Code section 3568 et seq.

On October 30, 1979, Wilson, who was then president of Local 371, had a meeting with Philip Encinio, the University manager of employee relations and development, and Debra Harrington, an employee relations representative, about the prohibition on use of the University mail system. At this meeting Encinio confirmed the fact that Local 371 could not, under University policy, use the mail system.

One outside organization, the United Way charity, has been permitted by the chancellor's office to use the campus mail system for a once-a-year fund raising effort. The fund raising is deemed to be an "official University use" and the chancellor's office is billed by the campus mail division for the cost of processing United Way's literature.

The University also uses its campus mail system to inform employees of its views respecting collective bargaining. Last year, in its monthly employee newsletter, "the UC Employee," a seven-part series was published setting forth the University's analysis of the new collective bargaining law as well as its position that it "does not endorse collective bargaining nor view it as either desirable or inevitable."

As of July 1, 1979, there were approximately 280 custodians and 9 custodial supervisors on the Berkeley campus. Local 371 has approximately 140 to 150 members on the campus most of whom are custodians. Local 371 has a list of its member's home addresses but the list is not accurate because members may move without giving a new address.

Local 371 has filed a request for recognition, under HEERA for a unit of custodians at the Berkeley campus. To support its request for recognition, Local 371 solicited authorization cards from both members and non-members.

In November 1979, after being refused use of the campus mail system, Local 371 sent notice of an organizational meeting, two weeks ahead of time, to its members through the U.S. mail. However, due to delays of the sort which often occur in the University's processing of U.S. mail, some of the members did not receive their copies of the notice at their buildings until after the meeting was held.

University witnesses testified that in their opinion it would be burdensome if employee organizations were permitted to use the campus mail system due to budget and staff cuts, and increased work load. But the University witnesses could offer no evidence to support their opinions.

Respecting distribution of employee organization literature by custodial supervisors, based on the testimony of Mr. Gilmore, the manager of custodial services, it is found that it was not burdensome in the past for custodial supervisors to distribute this literature. In fact, Local 371's past practice of placing its literature directly in custodial supervisors' boxes is less a burden on the campus mail system since no processing or sorting is required at the central mail location, than is the case with stamped, U.S. mail.

Local 371 has some alternative means of contact with its members. It can get a computer listing of custodians and their departments from the University and reach them by U.S. mail. Employee organizations may reserve University rooms for meetings. It may post notices on some 45 bulletin boards in custodial offices. There also is a University "poster route" by which, for a fee, the University will post notices on 66 bulletin boards throughout the campus. Finally, employee organizations are permitted to leaflet outside campus buildings or in parking lots.

ISSUE

Did the University violate Government Code section 3571(a), (b) or (d) by not permitting Charging Party to use its internal mail system for delivery of unstamped, organizational literature?

DISCUSSION AND CONCLUSIONS OF LAW

Section 3568 provides that:

Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for

the purpose of meetings concerned with the exercise of the rights guaranteed by this act.

In a decision interpreting an almost identical provision in the Educational Employment Relations Act (section 3543.1(b) of "EERA"³), the PERB held that the phrase, "other means of communication," includes school district mail systems. *Richmond Unified School District* (8/1/79) PERB Decision No. 99. Interpreting basically similar statutory language under EERA, the *Richmond* decision serves as precedent in interpreting section 3568 of HEERA. *Professional Engineers in California Government (PECG) v. State of California* (3/19/80) PERB Decision No. 118-S, at p. 11.

The University argues, however, that the circumstances of the case are distinguishable and thus the *Richmond* holding is inapplicable.

First, the University argues that there is no longstanding past practice of allowing employee organizations to use the mail system as in *Richmond*. However, in *Richmond* the PERB expressly stated:

PERB's finding that section 3543.1(b) authorizes organizational access to school mail systems is not limited to those situations where past practice by the District has "opened the forum". . . . [T]his Board concludes that a "past practice" limitation would be contrary to legislative intent. The statute does not restrict organizational access to any communication medium on the basis of past practice, but simply permits use of "other means of communication" with only the qualification that access be subject to "reasonable regulation." (Footnote omitted.)

(*Richmond Unified School District, supra*, at p. 13.)

³ Government Code section 3540 et seq. The only difference between the two statutory provisions, of which the University makes a point but the hearing officer finds to be irrelevant, is that in section 3568 of HEERA the phrase "subject to reasonable regulations" comes at the beginning, rather than in the middle as in section 3543.1(b) of EERA.

The University next argues that unlike the school mail systems at issue in *Richmond*, the University internal mail system is not an effective or efficient means of communication with employees. The University cites examples in the record of delays in processing mail by the University.

The fact of the matter is that delays in the University's internal mail system occur mainly at the central distribution center where incoming mail is sorted for delivery to campus locations. Local 371's practice has been to bypass the central location and instead place its communications directly in supervisors' boxes for distribution to custodians at the various campus buildings. There is no evidence in the record that this "shortcut" method of distribution is not efficient and effective.

Furthermore, the PERB's holding in *Richmond* is not premised on the relative efficiency of internal school mail systems. Rather, at the outset it is unqualifiedly stated:

As a threshold matter, PERB finds the Legislature intended to include use of internal school mail systems as one of the employee organization access rights authorized by section 3543.1(b) of EERA.

But, the University argues, if supervisors must deliver employee organization literature, their supervisory duties will be disrupted and an anomalous situation will be created in which supervisors, some of whom may belong to competing organizations, would be providing a "leafletting service" for rival employee organizations.

The University's position that custodial supervisors would be unduly burdened by having to deliver organization mail is speculative at best. If not permitted, much of this mail probably would be sent by U.S. mail and be delivered by supervisors anyway. Before the advent of HEERA, these same supervisors distributed employee organization literature and there is no evidence it was burdensome. In fact, the manager of custodial services was of the opinion that it had not been burdensome in the past.

The argument that supervisors may belong to competing employee organizations is unpersuasive. The same situation exists with respect to delivery of stamped organizational mail which

supervisors would continue to distribute. Furthermore, there existed the same possibility in the *Richmond* case of competing loyalties among the employees who delivered organizational mail to school sites, but this possibility did not appear to trouble the PERB. It is further noted that under sections 3580-3581.7, although supervisors under HEERA may belong to the same employee organization as do employees they supervise, they are precluded from participating in representational activities of non-supervisory employees, which fact serves to minimize their interest in organizational literature they might deliver to nonsupervisory custodial employees.

The University next argues that if it is required to allow employee organizations to use its internal mail system, under the "opening of the forum principle"⁴ it would have to similarly open use to all other kinds of groups "whose goals are not essential to the business of the University," thereby further burdening its internal mail system. Other than the fact that the University could present no evidence beyond mere speculation that its mail system would be overburdened by employee organization use, the simple answer to this argument is that if employee organizations are interpreted to have a statutory right under section 3568 to use the University's mail system, that right is not subject to divestment just because its enforcement might collaterally create the same right for other groups. Further, there would seem to be a rational basis for the University to distinguish communications to employees concerning their working conditions and employment relations with the University from communications from other groups with no University connection.

The University next contends that employee organizations have many alternative methods of communicating with employees, thus the prohibition of unstamped mail is a reasonable regulation of the use of University mails under section 3568.

⁴ See *Danskin v. San Diego School District* (1946) 28 Cal.2d 536 [171 P.2d 885]; *Wirta v. Alameda-Contra Costa Transit District* (1967) 68 Cal.2d 51 [64 Cal.Rptr. 430]; *Stanson v. Mott* (1976) 17 Cal.3d 206 [130 Cal.Rptr. 697].

The same alternatives presumably existed within the school districts involved in the *Richmond* case, but the PERB nevertheless found similar restrictions on use of the school mail system to be impermissible. Certainly, the employee organizations in *Richmond* had a statutory right under section 3543.1(b) of EERA to use bulletin boards. "Leafletting" employees on nonwork time also must be permitted. *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793 [16 LRRM 620]; *Los Angeles Teachers Union v. Los Angeles City Board of Education* (1969) 71 Cal.2d 551, 560 [78 Cal.Rptr. 732]. Also, as in the present case, in *Richmond* the employee organizations were permitted to distribute communications themselves to their members' worksites. *Richmond, supra*, at pp. 7-8.

The only alternative available to Local 371 which arguably was unavailable to the employee organizations in *Richmond* is the right to communicate with employees at their worksites via stamped U.S. mail.⁵ But the fact of the matter is that both stamped and unstamped mail get treated the same way in the University's mail system. The burden on the University is the same in either case. The only difference is that Local 371 would be required to pay U.S. postage for its mailings. Additionally, if Local 371 were allowed to continue its past practice of bypassing the University's main mail distribution center and instead placing its communications directly in custodial supervisors' boxes for distribution at custodial worksites, the University's mail system would be less burdened than if it had to handle the mail as U.S. postage in its main distribution center.

Given these circumstances, it can hardly be said that the University's present policy is a reasonable regulation of the use of the mail system. Furthermore, as the PERB said in *Richmond, supra*, at p. 28, fn. 11, "The existence of an alternative means of distribution does not absolve the districts of responsibility . . .," nor is there any "valid school interest to justify the distinction."

⁵ In fact, there is no indication one way or the other in *Richmond* as to whether employee organizations could communicate with employees at their worksites via U.S. mail.

The University further contends, however, that it must require employee organizations to stamp their mail in order to comply with the federal Private Express Statutes and Regulations.⁶ But as the PERB stated with respect to a similar defense raised in *Richmond, supra*, the PERB is empowered to interpret and enforce the provisions of HEERA. Whether there is a conflict between section 3568 of HEERA and the federal law is a matter for a different tribunal, and not resolvable in an unfair practice charge brought under HEERA. Cf. *Richmond, supra*, at p. 14, fn. 6.

Finally, the University argues that insofar as the unfair practice charge alleges that prohibition of Local 371's use of the internal mail system was a unilateral change, the charge is barred by the six-month statute of limitations in section 3563.2(a) since the University's prohibition against employee organization use of the mail system dates back over 13 years.

However, this proposed decision does not rest on the basis that the University committed an unlawful, unilateral change. Indeed, Local 371 does not include in its charge an allegation that the University's denial of access to the mail system violated Local 371's right to negotiate under section 3571(c). Rather, Local 371's statutory right of access under section 3568 is at issue. Furthermore, this statutory right did not exist until July 1, 1979, the effective date of HEERA, and the charge was filed within six months thereafter, on November 16, 1979. Under the University's theory, the six months limitations period would have run more than 12 years before the statutory right accrued, and Local 371, no matter how diligent, would never be able to file a timely unfair practice charge to protect its statutory right. Such an inequitable result will not be inferred here. Cf. *Communication Workers v. NLRB* (2d Cir. 1975) 520 F.2d 411 [89 LRRM 3028, 3031].

CONCLUSION

Having found the University's attempts to distinguish the present situation from the PERB's *Richmond* precedent to be

⁶ 18 U.S.C. sec. 1693 et seq., 39 U.S.C. sec. 601 et seq.; 39 C.F.R. sec. 310 et seq.

nonmeritorious, it is concluded that Local 371 is statutorily entitled under section 3568 to use the University's internal mail system. It follows that the University violated section 3571(b) by denying Local 371 its right to use this internal mail system.

In addition, some harm occurred to custodial employees' statutory right under section 3565 to participate in employee organization affairs by receiving communications from Local 371. Accordingly, as in *Richmond, supra*, at pp. 29-30, a violation of section 3571(a) also is found.

As to the alleged violation of section 3571(d), as in *Richmond, supra*, at pp. 30-1, there is no evidence that the University attempted to exert control over Local 371 or undermine its support as an entity. Thus, the alleged section 3571(d) violation is dismissed.

REMEDY

Section 3563.3 gives the PERB broad powers to remedy unfair practices, specifically including the power to issue cease and desist orders.

Since it has been found that the University unreasonably denied Local 371 access to its internal mail system, it will be ordered to cease and desist from denying such access for the purpose of communication with employees at the University of Berkeley campus. As in *Richmond, supra*, the cease and desist order will apply in favor of all employee organizations as well as Local 371.

In addition, it is appropriate that the University be required to post a notice incorporating the terms of the order. Posting of such notice will provide employees with notice that the University has acted in an unlawful manner and is being required to cease and desist from such unlawful activity. It effectuates the purposes of the HEERA that employees be informed of the resolution of this controversy and will announce the University's readiness to comply with the ordered remedy. See *Placerville Union School District* (9/18/78) PERB Decision No. 69. In *Pandol and Sons v. ALRB and UFW* (1979) 98 Cal.App.3d 580, 587, the Califor-

nia District Court of Appeal approved a posting requirement. The U.S. Supreme Court approved a similar posting requirement in *NLRB v. Express Publishing Co.* (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Regents of the University of California violated Government Code section 3571(a) and (b) by denying employee organizations access to the University's internal mail system on the Berkeley campus. Therefore, it is ordered that the University shall:

A. CEASE AND DESIST FROM:

In violation of Government Code section 3571(b), unreasonably denying employee organizations access to its internal mail system for the purpose of communicating with employees at its Berkeley campus;

In violation of Government Code section 3571(a), interfering with employees' right to participate in employee organization affairs by receiving communications from such organizations.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Within seven days after this proposed decision and order becomes final, post copies of Appendix "A" attached hereto for forty-five consecutive calendar days at its headquarters office and in all locations at the Berkeley campus where notices to employees are customarily posted;

2. At the end of the posting period, notify the San Francisco Regional Director of the Public Employment Relations Board in writing of the actions it has taken to comply with this Order.

The alleged violation of Government Code section 3571(d) is hereby dismissed.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order will become

final on July 7, 1980 unless a party files a timely statement of exceptions and supporting brief within twenty (20) calendar days following the date of service of this decision. Such statement of exceptions and supporting brief must actually be received by the Executive Assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on July 7, 1980 in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.

DATED: June 17, 1980

/s/ GERALD A. BECKER
Gerald A. Becker
Hearing Officer

Appendix A

Notice to Employees
 Posted by Order of the
 Public Employment Relations Board
 An Agency of the State of California

After a hearing in Case No. SF-CE-4-H in which both parties participated, it has been found that the Regents of the University of California violated Government Code section 3571(a) and (b) of the Higher Education Employer-Employee Relations Act by unreasonably denying employee organizations use of the University's internal mail system to communicate with employees at the Berkeley campus. As a result of this unlawful conduct we have been ordered to post this notice by the Public Employment Relations Board. We will:

CEASE AND DESIST FROM:

1. Unreasonably denying employee organizations access to the University internal mail system for the purpose of communicating with employees at the Berkeley campus.
2. Interfering with employees' right to participate in employee organization affairs by receiving communications from such organizations.

Dated:

Regents of the University of
 California

By: _____

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR 45 CONSECUTIVE CALENDAR DAYS FROM THE DATE OF POSTING AND MUST NOT BE DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

Appendix 12

In the Court of Appeal of the
 State of California

No. A029706

The Regents of the University of California,
 Appellant,

vs.

Public Employment Relations Board,
 Appellee.

[Filed Nov. 12, 1986]

Notice of Appeal to the Supreme Court
 of the United States

Notice is hereby given that The Regents of the University of California, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California affirming the decision of the Public Employment Relations Board, entered in this action on September 10, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED: November 11, 1986

JAMES E. HOLST
 JAMES N. ODLE
 SUSAN M. THOMAS

By /s/ JAMES N. ODLE
 James N. Odle
 Counsel for Appellant

OFFICE OF THE GENERAL
 COUNSEL

University of California
 590 University Hall
 Berkeley, CA 94720
 Telephone: (415) 642-2822

Appendix 13

[Letterhead]

United States Postal Service
General Counsel
Law Department
Washington, DC 20260-1100

September 25, 1986

Donald L. Reidhaar, Esquire
General Counsel
The University of California
500 University Hall
2200 University Avenue
Berkeley, CA 94720

Re: *Regents of the University of California vs. Public
Employment Relations Board*, Court of Appeal,
#A029706

Dear Sir:

We have been notified that the California Supreme Court has denied the Regents' petition for review of the decision of the Court of Appeal in the above-captioned proceeding. We recognize that the Court of Appeal considered the application of the Private Express Statutes, 18 U.S.C. §§ 1693-1699, 39 U.S.C. §§ 601-06, to the order of the Board and concluded that the University's compliance with the order would not violate the Statutes. With all respect to the court, however, we consider that its decision, to the detriment of significant Federal interests, misinterprets Federal law which it is the responsibility of the United States Postal Service to enforce. We therefore advise you that the Postal Service does not concur in the Court of Appeal's decision and that Advisory Opinion PES No. 82-9 continues in effect.

You are advised that the University may not lawfully carry the letters of organizations of the University's employees to those employees under the circumstances involved in this litigation, without the payment of postage on those letters as though they were carried by the Postal Service. Should the University carry letters in violation of the Private Express Statutes, as implemented by 39 C.F.R. Parts 310-320, it, and the senders of those letters, are subject to the penalties provided by Federal law for violations. The University and the senders may also be liable in accordance with 39 C.F.R. § 310.5 for the postage that would have been paid had those letters been sent through the United States Mails.

Please inform me promptly of your intention to comply with these statutes and regulations.

Sincerely,

/s/ LOUIS A. COX
Louis A. Cox

A-98

Appendix 14

[Letterhead]

The Regents of the University of California
Office of the General Counsel

October 7, 1986

Louis A. Cox
General Counsel
United States Postal Service
Law Department
Washington, D.C. 20260-1100

Re: Regents of the University of California v.
Public Employment Relations Board
Court of Appeal Case No. A029706

Dear Mr. Cox:

This replies to your letter of September 25, 1986, advising that the United States Postal Service does not concur in the California Court of Appeal's decision in the above-referenced case. You requested assurance from us of our intention to comply with federal laws governing the carriage of mail in the University's internal mail system.

The University intends to seek review of this matter by the United States Supreme Court. Pending disposition of this matter by that Court, we have been advised that the Public Employment Relations Board will not seek enforcement of the Court of Appeal's decision. (See attached letter dated September 24, 1986.) Hence, the University will not carry letters of employee organizations without payment of postage unless or until the Supreme Court either refuses to hear the matter or affirms the decisions of the California courts.

Very truly yours,

/s/ JAMES E. HOLST

James E. Holst
General Counsel

at
Attn.

cc: R. Brady, w/enc.
R. Catalano, w/enc.

A-99

Appendix 15

Constitution of the United States

Article I

Section 8, Clause 7

Powers Granted to Congress

[The Congress shall have power . . .]

7. To establish post offices and post roads.

Appendix 16

18 United States Code
Chapter 83—Postal Service

§ 1693. Carriage of mail generally

Whoever, being concerned in carrying the mail, collects, receives, or carries any letter or packet, contrary to law, shall be fined not more than \$50 or imprisoned not more than thirty days, or both.

(June 25, 1948, c. 645, 62 Stat. 776.)

§ 1694. Carriage of matter out of mail over post routes

Whoever, having charge or control of any conveyance operating by land, air, or water, which regularly performs trips at stated periods on any post route, or from one place to another between which the mail is regularly carried, carries, otherwise than in the mail, any letters or packets, except such as relate to some part of the cargo of such conveyance, or to the current business of the carrier, or to some article carried at the same time by the same conveyance, shall, except as otherwise provided by law, be fined not more than \$50.

(June 25, 1948, c. 645, 62 Stat. 776.)

§ 1695. Carriage of matter out of mail on vessels

Whoever carries any letter or packet on board any vessel which carries the mail, otherwise than in such mail, shall, except as otherwise provided by law, be fined not more than \$50 or imprisoned not more than thirty days, or both.

(June 25, 1948, c. 645, 62 Stat. 777.)

§ 1696. Private express for letters and packets

(a) Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place to any other city, town, or place, between

which the mail is regularly carried, shall be fined not more than \$500 or imprisoned not more than six months, or both.

This section shall not prohibit any person from receiving and delivering to the nearest post office, postal car, or other authorized depository for mail matter any mail matter properly stamped.

(b) Whoever transmits by private express or other unlawful means, or delivers to any agent thereof, or deposits at any appointed place, for the purpose of being so transmitted any letter or packet, shall be fined not more than \$50.

(c) This chapter shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation, or by special messenger employed for the particular occasion only. Whenever more than twenty-five such letters or packets are conveyed or transmitted by such special messenger, the requirements of section 601 of title 39, shall be observed as to each piece.

(June 25, 1948, c. 645, 62 Stat. 777; Aug. 12, 1970, Pub.L. 91-375, § 6(j)(14), 84 Stat. 778.)

Appendix 17

39 United States Code

Chapter 6—Private Carriage of Letters

§ 601. Letters carried out of the mail

(a) A letter may be carried out of the mails when—

- (1) it is enclosed in an envelope;
- (2) the amount of postage which would have been charged on the letter if it had been sent by mail is paid by stamps, or postage meter stamps, on the envelope;
- (3) the envelope is properly addressed;
- (4) the envelope is so sealed that the letter cannot be taken from it without defacing the envelope;
- (5) any stamps on the envelope are canceled in ink by the sender; and
- (6) the date of the letter, of its transmission or receipt by the carrier is endorsed on the envelope in ink.

(b) The Postal Service may suspend the operation of any part of this section upon any mail route where the public interest requires the suspension.

Pub.L. 91-375, Aug. 12, 1970, 84 Stat. 727.

Appendix 18

39 Code of Federal Regulations

Subchapter E—Restrictions on Private Carriage of Letters

Part 310—Enforcement of the Private Express Statutes

Sec.

- 310.1 Definitions.
- 310.2 Unlawful carriage of letters.
- 310.3 Exceptions.
- 310.4 Responsibility of carriers.
- 310.5 Payment of postage on violation.
- 310.6 Advisory opinions.
- 310.7 Amendment of regulations.

AUTHORITY: 39 U.S.C. 401, 404, 601-606; 18 U.S.C. 1693-1699, 1724.

SOURCE: 39 FR 33211, Sept. 16, 1974, unless otherwise noted.

§ 310.1 Definitions.

(a) "Letter" is a message directed to a specific person or address and recorded in or on a tangible object, subject to the following:

(1) Tangible objects used for letters include, but are not limited to, paper (including paper in sheet or card form), recording disks, and magnetic tapes. Tangible objects used for letters do not include (i) objects the material or shape and design of which make them valuable or useful for purposes other than as media for long-distance communications, unless they are actually used as media for personal and business correspondence, and (ii) out-sized, rigid objects not capable of enclosure in envelopes, sacks, boxes or other containers commonly used to transmit letters or packets of letters.

(2) "Message" means any information or intelligence that can be recorded as described in paragraph (a)(4) of this section.

(3) A message is directed to a "specific person or address" when, for example, it, or the container in which it is carried, singly or with other messages, identical or different, is marked for delivery to a specific person or place, or is delivered to a specific

person or place in accordance with a selective delivery plan. Selective delivery plans include delivery to particular persons or addresses by use of detached address labels or cards; address lists; memorized groups of addresses; or "piggy-backed" delivery with addressed articles of merchandise, publications, or other items. Selective delivery plans do not include distributions of materials without written addresses to passersby on a particular street corner, or to all residents or randomly selected residents of an area. A message bearing the name or address of a specific person or place is a letter even if it is intended by the sender to be read or otherwise used by some person or persons other than or in addition to the addressee.

(4) Methods by which messages are recorded on tangible objects include, but are not limited to, the use of written or printed characters, drawing, holes, or orientations of magnetic particles in a manner having a predetermined significance.

(5) Whether a tangible object bears a message is to be determined on an objective basis without regard to the intended or actual use made of the object sent.

(6) Identical messages directed to more than one specific person or address or separately directed to the same person or address constitute separate letters.

(7) The following are not letters within the meaning of these regulations:¹

(i) Telegrams.

(ii) Checks, drafts, promissory notes, bonds, other negotiable and nonnegotiable financial instruments, stock certificates, other securities, insurance policies, and title policies when shipped to, from, or between financial institutions.

¹ Several of the items enumerated in this paragraph (a)(7) do not self-evidently lie outside of the definition of "letter". To the extent, however, that there is any question whether these items may properly be excluded by definition, the Postal Service has determined by adoption of these regulations that the restrictions of the Private Express Statutes are suspended pursuant to 39 U.S.C. 601(b).

(A) As used above, "checks" and "drafts" include documents intrinsically related to and regularly accompanying the movement of checks or drafts within the banking system. "Checks" do not include materials accompanying the movement of checks to financial institutions from persons who are not financial institutions, or vice versa, except such materials as would qualify under § 310.3(a) if "checks" were treated as cargo. Specifically, for example, "checks" do not include bank statements sent to depositors showing deposits, debits, and account balances.

(B) As used above, "financial institutions" means:

(1) As to checks and drafts: banks, savings banks, savings and loan institutions, credit unions, and their offices, affiliates, and facilities.

(2) As to other instruments: institutions performing functions involving the bulk generation, clearance, and transfer of such instruments.

(iii) Abstracts of title, mortgages and other liens, deeds, leases, releases, articles of incorporation, papers filed in lawsuits or formal quasi-judicial proceedings, and orders of courts and of quasi-judicial bodies.

(iv) Newspapers and periodicals.

(v) Books and catalogs consisting of 24 or more bound pages with at least 22 printed, and telephone directories. Separate letters of less than 24 bound and 22 printed pages bound to other material do not qualify for this exclusion. In determining whether separate letters have been bound to other material, the following factors will be considered, along with any other relevant factors: Whether the parts are visually similar; whether the parts were printed and bound together at the same time and by the same process; whether the binding serves an important purpose and has been a longstanding practice; and whether the same individual reads all parts of the bound document. Ordinarily, books and catalogs deal with matters of interest to, and are intended for, a substantial number of recipients. In addition, books generally contain a substantial number of pages. Accordingly, this exclusion will not apply when the nature of the message conveyed, the

limited numbers of published copies and of recipients, the limited number of pages, or other relevant factors suggest that it is not appropriate to treat the material as a book or catalog. An item distributed privately, or privately and by mail, to fewer than 25 separate persons or places will generally not be treated as a book or catalog falling within this exclusion.

(vi) Matter sent from a printer, stationer, or similar source, to a person ordering such matter for use as his letters. This exclusion applies whether or not the printer, stationer, or similar source is owned by or affiliated with the person who orders such matter for use as his letters.

(vii) Letters sent to a records storage center exclusively for storage, letters sent exclusively for destruction, letters retrieved from a records storage center, and letters sent as part of a household or business relocation.

(viii) Tags, labels, stickers, signs or posters the type-size, layout or physical characteristics of which indicate they are primarily intended to be attached to other objects for reading.

(ix) Photographic material being sent by a person to a processor and processed photographic material being returned from the processor to the person sending the material for processing.

(x) Copy sent from a person to an independent or company-owned printer or compositor, or between printers and compositors, and proofs or printed matter returned from the printer or compositor to the office of the person who initially sent the copy.

(xi) Sound recordings, films, and packets of identical printed letters containing messages all or the overwhelming bulk of which are to be disseminated to the public. The "public" does not include individuals residing at the place of address; individuals employed by the organization doing business at the place of address (whether or not the actual place of employment is the place of address); individuals who are members of an organization, if an organization is located at the place of address; or other individuals who, individually or as members of a group, are reasonably identifiable to the sender.

(xii) Computer programs recorded on media suitable for direct input. For the conditions under which the Private Express Statutes are suspended for data processing materials, see § 320.2.

(b) "Packet" means two or more letters, identical or different, or two or more packets of letters, under one cover or otherwise bound together. As used in these regulations, unless the context otherwise requires, "letter" or "letters" includes "packet" or "packets".

(c) "Person" means an individual, corporation, association, partnership, governmental agency, or other organization or entity.

(d) "Post routes" are routes on which mail is carried by the Postal Service, and includes post roads as defined in 39 U.S.C. 5003, as follows:

(1) The waters of the United States, during the time the mail is carried thereon;

(2) Railroads or parts of railroads and air routes in operation;

(3) Canals, during the time the mail is carried thereon;

(4) Public roads, highways, and toll roads during the time the mail is carried thereon; and

(5) Letter-carrier routes established for the collection and delivery of mail.

(e) "Private carriage", "private carrier", and terms of similar import used in connection with the Private Express Statutes or these regulations mean carriage by anyone other than the Postal Service, regardless of any meaning ascribed to similar terms under other bodies of law or regulation.

(f) The "Private Express Statutes" are set forth in 18 U.S.C. 1693-1699 and 1724 and 39 U.S.C. 601-606 (1970).

(g) The term "identical printed letters" includes letters that differ only in name, address or serial number.

[39 FR 33211, Sept. 16, 1974; 39 FR 36114, Oct. 8 1974, as amended at 40 FR 23295, May 29, 1975; 44 FR 52833, Sept. 11, 1979; 45 FR 3034, Jan. 16, 1980; 45 FR 59873, Sept. 11, 1980]

§ 310.2 Unlawful carriage of letters.

(a) It is generally unlawful under the Private Express Statutes for any person other than the Postal Service in any manner to send or carry a letter on a post route or in any manner to cause or assist such activity. Violation may result in injunction, fine or imprisonment or both and payment of postage lost as a result of the illegal activity (see § 310.5).

(b) Activity described in paragraph (a) of this section is lawful with respect to a letter if—

(1)(i) The letter is enclosed in an envelope or other suitable cover;

(ii) The amount of postage which would have been charged on the letter if it had been sent through the Postal Service is paid by stamps, or postage meter stamps, on the cover or by other methods approved by the Postal Service;

(iii) The name and address of the person for whom the letter is intended appear on the cover;

(iv) The cover is so sealed that the letter cannot be taken from it without defacing the cover;

(v) Any stamps on the cover are canceled in ink by the sender; and

(vi) The date of the letter, or of its transmission or receipt by the carrier, is endorsed on the cover in ink by the sender or carrier, as appropriate; or

(2)(i) The activity is in accordance with the terms of a written agreement between the shipper or the carrier of the letter and the Postal Service. Such an agreement may include some or all of the provisions of paragraph (b)(1) of this section, or it may change them, but it must—

(A) Adequately ensure payment of an amount equal to the postage to which the Postal Service would have been entitled had the letters been carried in the mail;

(B) Remain in effect for a specified period (subject to renewals); and

(C) Provide for periodic review, audit, and inspection.

(ii) Possible alternative arrangements may include but are not limited to—

(A) Payment of a fixed sum at specified intervals based on the shipper's projected shipment of letters for a given period, as verified by the Postal Service; or

(B) Utilization of a computer record to determine the volume of letters shipped during an interval and the applicable postage to be remitted to the Postal Service.

(c) The Postal Service may suspend the operation of any part of paragraph (b) of this section where the public interest requires the suspension.

(d) Activity described in paragraph (a) of this section is permitted with respect to letters which—

(1) Relate to some part of the cargo of, or to some article carried at the same time by, the conveyance carrying it (see § 310.3(a));

(2) Are sent by or addressed to the carrier (see § 310.3(b));

(3) Are conveyed or transmitted without compensation (see § 310.3(c));

(4) Are conveyed or transmitted by special messenger employed for the particular occasion only, provided that not more than twenty-five such letters are conveyed or transmitted by such special messenger (see § 310.3(d)); or

(5) Are carried prior or subsequent to mailing (see § 310.3(e)).

[39 FR 33211, Sept. 16, 1974, as amended at 45 FR 77029, Nov. 21, 1980]

§ 310.3. Exceptions.

(a) *Cargo.* The sending or carrying of letters is permissible if they accompany and relate in all substantial respects to some part of the cargo or to the ordering, shipping or delivering of the cargo.

(b) *Letters of the carrier.* (1) The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the individual actually carrying the letters is not the person sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person (see § 310.3(b)(2)) and the letters must relate to the current business of such person.

(2) The fact that the individual actually carrying the letters may be an officer or employee of the person sending the letters or to whom the letters are addressed for certain purposes does not necessarily mean that he is an officer or employee for purposes of this exception. The following factors bear on the qualifications for the exception: the carrying employee is employed for a substantial time, if not fulltime (letters must not be privately carried by casual employees); the carrying employee carries no matter for other senders; the carrying employee is a regular salaried employee and shares in all privileges enjoyed by other regular employees (including employees not engaged primarily by the letter carrying function), including but not limited to salary, annual vacation time, absence allowed for illness, health benefits, workmen's compensation insurance, and retirement benefits.

(3) Separately incorporated carriers are separate entities for purposes of this exception, regardless of any subsidiary, ownership, or leasing arrangement. When, however, two concerns jointly operate an enterprise with joint employees and share directly in its revenues and expenses, either of the concerns may carry the letters of the joint enterprise.

(c) *Private hands without compensation.* The sending or carrying of letters without compensation is permitted. Compensation generally consists of a monetary payment for services rendered. Compensation may also consist, however, of non-monetary valuable consideration and of good will. Thus, for example, when a business relationship exists or is sought between the carrier and its user, carriage by the carrier of the user's letter will ordinarily not fall under this exception; or, when a person is engaged in the transportation of goods or persons for hire, his carrying of letters "free of charge" for customers whom he does charge for the carriage of goods or persons does not fall under this exception.

(d) *Special messenger.* (1) The use of a special messenger employed for the particular occasion only is permissible to transmit letters if not more than twenty-five letters are involved. The permission granted under this exception is restricted to use of messenger service on an infrequent, irregular basis by the sender or addressee of the message.

(2) A special messenger is a person who, at the request of either the sender or the addressee, picks up a letter from the sender's home or place of business and carries it to the addressee's home or place of business, but a messenger or carrier operating regularly between fixed points is not a special messenger.

(e) *Carriage prior or subsequent to mailing.* (1) The private carriage of letters which enter the mail stream at some point between their origin and their destination is permissible. Except as provided in paragraph (e)(3) of this section, however, the carriage of letters from a place where they have been opened, read, separated, or otherwise utilized, does not fall within this exception even though such letters had previously been in the mail stream. Similarly, the carriage of letters to a place where they will be consolidated or otherwise utilized does not fall within this exception even though they will subsequently enter the mail stream.

(2) Examples of permitted activities are the pickup and carriage of letters which are delivered to post offices for mailing; the pickup and carriage of letters at post offices for delivery to addressees; and the bulk shipment of individually addressed letters ultimately carried by the Postal Service.

(3) The private carriage of letters from branches of an organization to a location for preparation for mailing does not constitute a consolidation. The private carriage of letters from an organization's point of mail delivery to its branches in the locality does not constitute a separation.

[39 FR 33211, Sept. 16, 1974, as amended at 44 FR 52834, Sept. 11, 1979; 45 FR 59873, Sept. 11, 1980]

§ 310.4 Responsibility of carriers.

Private carriers are cautioned to make sure that their carriage of matter is lawful within the definition, exceptions, suspension, and conditions contained in this part and in Part 320 of this chapter. They should take reasonable measures to inform their customers of the contents of these regulations so that only proper matter is tendered to them for carriage. Carriers should desist from carrying any matter when the form of shipment, identity of sender or recipient, or any other information reasonably accessible to them indicates that matter tendered to them for carriage is not proper under these regulations.

§ 310.5 Payment of postage on violation.

(a) Upon discovery of activity made unlawful by the Private Express Statutes, the Postal Service may require any person or persons who engage in, cause, or assist such activity to pay an amount or amounts not exceeding the total postage to which it would have been entitled had it carried the letters between their origin and destination.

(b) The amount equal to postage will be due and payable not later than 15 days after receipt of formal demand from the Inspection Service unless an appeal is taken to the Judicial Officer Department in accordance with rules of procedure set out in Part 959 of this chapter.

(c) Refusal to pay an unappealed demand or a demand that becomes final after appeal will subject the violator to civil suit by the Postal Service to collect the amount equal to postage.

(d) The payment of amounts equal to postage on violation shall in no way limit other actions to enforce the Private Express Statutes by civil or criminal proceedings.

§ 310.6 Advisory opinions.

An advisory opinion on any question arising under this part and Part 320 of this chapter may be obtained by writing the Law Department, U.S. Postal Service, Washington, D.C. 20260. A numbered series of advisory opinions is available for inspection by the public in the Library of the U.S. Postal Service, and copies of

individual opinions may be obtained upon payment of charges for duplicating services.

§ 310.7 Amendment of regulations.

Amendments of the regulations in this part and in Part 320 may be made only in accordance with the rulemaking provisions of the Administrative Procedure Act.

Appendix 19

39 Code of Federal Regulations

Part 320—Suspension of the Private Express Statutes

§ 320.1 Definitions.

The definitions in § 310.1 apply to Part 320 as well.¹

(39 U.S.C. 401, 404, 601)

[39 FR 33212, Sept. 16, 1974]

* * *

§ 320.4 Suspension for certain letters of college and university organizations.

The operation of 39 U.S.C. 601(a)(1) through (6) and § 310.2(b)(1) through (6) of this chapter is suspended on all post routes to permit colleges and universities to carry in their internal mail systems the letters of their *bona fide* student or faculty organizations to campus destinations. This suspension does not cover the letters of faculty members, students, or organizations other than *bona fide* student or faculty organizations of the carrying college or university. Colleges and universities choosing to provide their student or faculty organizations access to their internal mail systems are responsible for assuring that only letters of *bona fide* student or faculty organizations addressed to campus destinations are carried. (See § 310.4.) For purposes of this suspension, "internal mail systems" are those which carry letters on, between, and among the various campuses of a single college or university and which operate in accordance with the *Letters of the carrier* exception in 39 CFR 310.3(b).

(39 U.S.C. 401, 404, 601-606; 18 U.S.C. 1693-1699, 1724)

[44 FR 52835, Sept 11, 1979]

¹ Several of the items enumerated in § 310.1(a)(7) do not self-evidently lie outside of the definition of "letter". To the extent, however, that there is any question whether these items may properly be excluded by definition, the Postal Service has determined by adoption of these regulations that the restrictions of the Private Express Statutes are suspended pursuant to 39 U.S.C. 601(b).

Appendix 20

Higher Education Employer-Employee Relations Act
(California Government Code section 3560-3599)

3568. Right of Access and use by Employee Organizations

Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act.

(Added Stats. 1978, c. 744, § 3, operative July 1, 1979.)

* * * * *

3571. Unlawful Employer Practices

It shall be unlawful for the higher education employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

* * * * *

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another; provided, however, that subject to rules and regulations adopted by the board pursuant to Section 3563, an employer shall not be prohibited from permitting employees to engage in meeting and conferring or consulting during working hours without loss of pay or benefits.

Opinion of Hon. George W. Wickersham, of New York

Appointed March 5, 1909

Department of Justice

Transportation of Letters Outside the Mail

29 Op. Atty Gen. 418

May 23, 1912

Syllabus:

The Erie Railroad Co. has the right under section 184 of the Penal Code (35 Stat. 1124) to transport over its lines, otherwise than in the mail, letters written by the secretary of the Erie Employees' Relief Association, an organization composed of officers and employees of that railroad, to the railroad company, but can not transport letters written by the officers of said relief association to its members.

Addressee:

The Postmaster General

Opinion by: Wickersham

Opinion:

SIR: I have the honor to acknowledge the receipt of your letter of May 16, 1912, requesting an opinion upon the following question:

"Whether the Erie Railroad Co. has the right under section 184 of the Penal Code (35 Stat. 1124) to transport over its lines, otherwise than in the mail, letters written by the secretary of the Erie Employees' Relief Association, an organization composed of officers and employees of that railroad."

Section 184 of the Penal Code and its predecessor, section 3985, Revised Statutes, have been construed from the point of view of this question by the opinion of Mr. Attorney General Harmon (21 Op. 394), and by my opinion of December 20, 1910 (28 Op. 537); and in these opinions it is fully shown that Congress has imposed two conditions upon the free transportation of letters outside the mail: First, that the letters should be the

letters of the carrier itself; and second, that they should relate to its own current business. The concurrence of both these conditions is essential to the privilege.

Upon these principles it is apparent that the privilege of free transportation outside the mail does not extend to such of the letters referred to in your question as are not only written by the secretary of the relief association, but addressed to its members, because such letters being neither written of nor addressed to the carrier, are not communications of the carrier itself.

The constitution and by-laws of the Erie Employees' Relief Association show that the association is not a department of the railroad company, but a separate and independent organization, governed by directors of its own, having its own secretary, chosen by its directors, having its own funds and property wholly separate from those of the railroad, and having obligations and liabilities not attached upon the railroad. This being so, it is not material that the purpose of the association and the subject of its communications is a pension system for the carrier's employees, and so a matter of interest to it, for the law excepts only the communications of the carrier itself. In this regard the relief association stands in exactly the same case with the class of companies referred to by Mr. Attorney General Harmon in his opinion above cited, such as separate companies operating car lines, railroad hotels, or railroad restaurants; nor does it differ in principle from the case of the railroad association formed to weight all carload shipments of the constituent companies, which was passed upon in my opinion of December 20, 1910, above cited.

A different situation is presented by such of the letters referred to in your question as are addressed by the association to the railroad company (or its officers and employees as representing the railroad company) concerning relations between the railroad company and the association. These communications fall within both of the conditions imposed by Congress, because being addressed to the carrier itself, they are its communications within the intention of the statute, as shown by the opinions cited, and being on the subject of the carrier's own relation to the relief association, they relate to the carrier's current business.

A-118

I am of opinion therefore, as above stated, that in so far as the letters referred to in your question are written by officers of the relief association to its members, they are not within the exception authorized by Congress; but that in so far as the letters are addressed to the railroad company (or its officers or employees as representing it) they are within the exception authorized by Congress and may be carried free outside the mail.

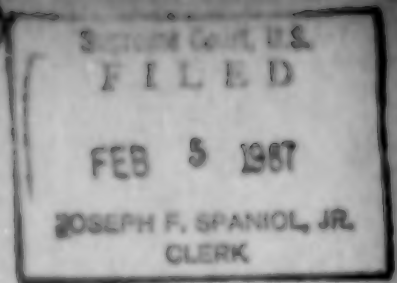
Very respectfully,

GEORGE W. WICKERSHAM.

MOTION

86-935

No. 86-346



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Appellant,

v.

THE CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD,
Appellee,

and

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 371,
and WILLIAM H. WILSON, PRESIDENT, LOCAL 371,
Appellees.

On Appeal from the Court of Appeal
of the State of California,
First Appellate District

**MOTION OF APPELLEE CALIFORNIA PUBLIC EMPLOYMENT
RELATIONS BOARD TO DISMISS OR AFFIRM**

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February 6, 1987

35 PW

QUESTION PRESENTED

The question presented by this motion to dismiss or affirm is whether a substantial federal question is posed when the California courts, interpreting California law, have concluded that communications regarding labor relations from employee organizations to employees of the University of California are part of the University's current business, and when the federal Private Express statutes expressly permit distribution of such communications.

/ PARTIES TO PROCEEDINGS BELOW

The parties below were the Regents of the University of California (UC or University), the California Public Employment Relations Board (PERB or Board), the American Federation of State, County and Municipal Employees, Local 371 (AFSCME) and William H. Wilson, President, Local 371. Additionally, at the request of the University, the United States Postal Service (USPS) participated as *amicus curiae* before the California Court of Appeal.

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No. 86-346

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Appellant,
v.

THE CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD,
Appellee,
and

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 371,
and WILLIAM H. WILSON, PRESIDENT, LOCAL 371,
Appellees.

On Appeal from the Court of Appeal
of the State of California,
First Appellate District

**MOTION OF APPELLEE CALIFORNIA PUBLIC EMPLOYMENT
RELATIONS BOARD TO DISMISS OR AFFIRM**

Appellee California Public Employment Relations Board moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the California Court of Appeal on the ground that the question on which decision of the cause depended is so unsubstantial as not to need further argument; it was correctly decided by the Court of Appeal.

INTRODUCTION

For the purposes of this Motion to Dismiss or Affirm, Appellee PERB adopts Appellant UC's statement of the Opinions Below, Constitutional Provisions and Statutes Involved and, with two exceptions,¹ the Statement of the Case.

With regard to Jurisdiction, Appellee PERB argues herein that no substantial federal question is presented. This case concerns California Government Code section 3568.² The California Court of Appeal affirmed PERB's ruling that a statutory exception explicit in the Private Express statutes³ allows the University of California to carry to its employees the letters of labor unions without postage when those letters concern the current business

¹ Despite the Private Express statutes, the University *did* allow unions to use its internal mail system without affixing postage until the passage of the Higher Education Employer-Employee Relations Act (HEERA or Act), California Government Code sections 3560-3599. See Certified Record at p. 261; cf. Jurisdictional Statement at p. 3. Furthermore, the record in this case does not include the letters appended to the Jurisdictional Statement as App. 13 and 14 nor was Appellee aware of the existence of these letters before service of the Jurisdictional Statement. These letters should be stricken.

² Government Code section 3568 provides:

Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act.

³ The Private Express statutes generally prohibit the private carriage of mail without postage, but provide for suspensions of the prohibition where the public interest requires it. 62 Stats. at Large 776; 18 U.S.C. section 1696 and 84 Stats. at Large 727; 39 U.S.C. section 601.

of the University. Fostering the scheme of bilateral collective bargaining and employee representation contemplated for the University by the California Legislature is well within any fair definition of the University's current business. This Court need not review this determination further.⁴

Furthermore, the case is not appropriate for a writ of certiorari under 28 U.S.C. section 1257 (3) because the issue presented is not the subject of conflicting decisions nor is it an important question of law.

ARGUMENT

THE APPEAL SHOULD BE DISMISSED FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION OR THE COURT OF APPEAL RULING SHOULD BE SUMMARILY AFFIRMED.

I. THE CALIFORNIA COURT OF APPEAL CORRECTLY CONCLUDED THAT COMMUNICATIONS REGARDING LABOR RELATIONS FROM EMPLOYEE

⁴ Nor is the validity of the statute (Gov't. Code section 3568) in question as is necessary under 28 U.S.C. section 1257 (2). (Indeed, the University has not expressly recited that the state statute, as applied, is repugnant to the law. See *Rohr Aircraft Corp. v. County of San Diego*, 362 U.S. 628, 629 (1960).)

When a state agency's finding is at issue, rather than the validity of its enabling statute, jurisdiction under section 1257 (2) does not lie. *Lerner v. Casey*, 357 U.S. 468, 473 (1958). Rather than attacking the statute for some deprivation of federal right, the University contends only that its mail system cannot be used by unions free of charge because of the Private Express statutes. In other words, the University objects only to PERB's *finding* that, under the circumstances of this case including the federal Private Express statutes, it is unreasonable to deny access to the University's mail system to unions. Accordingly, jurisdiction under section 1257 (2) does not lie.

ORGANIZATIONS TO EMPLOYEES OF THE UNIVERSITY OF CALIFORNIA ARE PART OF THE UNIVERSITY'S CURRENT BUSINESS, AND THAT AN EXCEPTION TO THE FEDERAL PRIVATE EXPRESS STATUTE EXPRESSLY PERMITS DISTRIBUTION OF SUCH COMMUNICATIONS.

A. The Court of Appeal Correctly Decided That Communications Regarding Labor Relations From Employee Organizations to Employees Are Part of the University's "Current Business" Under California and Federal Law.

Title 18 U.S.C. section 1694 provides for criminal sanctions for private carriage of mail, but makes explicit exceptions:

Whoever, having charge or control of any conveyance operating by land, air or water, which regularly performs trips at stated periods on any post route, or from one place to another between which the mail is regularly carried, carries, otherwise than in the mail, any letters or packets, *except such as relate to some part of the cargo of such conveyance, or to the current business of the carrier*, or to some article carried at the same time by the same conveyance, shall, except as otherwise provided by law, be fined not more than \$50. (Emphasis added.)

Significantly, the statute is not entitled the "Letters of the Carrier" exception, nor does it make any mention of the sender or addressee.⁵ Simply put, the statute mandates that the letters a private carrier carries must

⁵ Previously all parties referred to the exception as the "Letters of the Carrier" exception, parroting the heading used by the USPS when it promulgated regulations in 1974. However, as explained in the text, the statutory exception enacted in 1909 is more properly referred to as the "Business of the Carrier" exception.

relate to its current business or a fine will be levied. The U.S. Congress, not PERB or the California Court of Appeal, determined that the Postal Service could protect its monopoly yet forego revenue from carriers carrying letters relating to their current business.

The USPS has opined in Private Express Statutes Advisory Opinion (Ad.Op. PES) 82-9 (Jurisdictional Statement Appendix, App. 9, A-66) that the Business of the Carrier exception did not apply to the facts of this case since employee organization materials were not related to the "current business" of the University. Moreover, Appellant informs the Court that the USPS intends to ignore the decision of the courts of California that the University's current business includes fostering the labor relations scheme codified in HEERA. For the reasons that follow, the USPS' opinion and actions reflect a lack of understanding of the nature of public sector labor relations and a shocking indifference to the determination of the highest courts of the state on the current business of the University of California.

1. The State of California, through its legislature and its courts, defines the realm of the University of California's current business.

In its decision, the California court held that "[u]nmistakably, the intent of the statute [HEERA] is to make collective bargaining a part of the 'current business' of the University." *Regents of the University of California v. Public Employment Relations Bd.*, 182 Cal.App.3d 70, 80 (1986); App. 1, A-9. The Court correctly concluded:

We only hold that where, as here, the Legislature has clearly emphasized the public interest in developing harmonious labor relations between the University and its employees, the internal mail system may be used by the interested parties for purposes of relevant communications.

Id. at p. 81; A-11.

This holding was derived from a comprehensive examination of the HEERA plan.⁶ The court noted that the Legislature explicitly determined that it was a matter of statewide concern to develop harmonious and cooperative labor relations between public institutions of higher education and their employees, citing section 3560(a). Further, the court recognized that section 3560(d) clearly stated that the higher education employers have a fundamental interest in the promotion of the harmonious relations and the responsibilities granted under the Act. Finally, the court looked at section 3560(e) which declares:

It is the purpose of this chapter to provide the means by which relations between each higher education employer and its employees may assure that the responsibilities and authorities granted to the separate institutions under the Constitution and by statute are carried out in an atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them. . . .

⁶ The Court of Appeal decision can be found at App. 1, pp. A-1 through 11 of the Jurisdictional Statement Appendix, and the discussion of the HEERA sections at p. A-9.

In light of such directive language, it was reasonable to conclude, as the court did, that the Legislature intended to allow access to UC's internal mail system to unions for the purposes of communicating with UC employees on labor relations matters and that allowing such access, and indeed the subject matter of the communications, is part of the current business of the University as determined by the Legislature. App. 1, pp. A-10-11; PERB Decision No. 420-H at App. 4, pp. A-38-39.

Furthermore, section 3565 of the HEERA affords employees the right to "form, join, and participate in the activities of employee organizations." It requires higher education employers to confer with non-exclusive representatives on request when employees want such representation, *California State University, Hayward* (1982) PERB Decision No. 211-H, 6 PERC par. 13115;⁷ *Regents of the University of California v. Public Employment Relations Bd.*, 168 Cal.App.3d 937, 214 Cal.Rptr. 698 (1985), and to negotiate with exclusive representatives, *HEERA* section 3570. Additionally, HEERA allows the unions, in an effort to do their share toward the joint goal of labor peace and stability, to represent and communicate with the employees. Cf. *Richmond Unified School District/Simi Valley Unified School District* (1979) PERB Decision No. 99, 3 PERC par. 10105. Inasmuch as PERB and the courts have interpreted section 3568 to permit employee organizations

⁷ Copies of all PERB Administrative Decisions cited in this motion are being lodged with the Court. Decision No. 420 is found at App. 4.

access to internal mail systems, the "current business" of the University includes the implementation of this HEERA right as well.⁸

The federal courts must accept the determination of the California Supreme Court and intermediate courts on the matter of state law here, i.e., the current business of the University of California. After all, it is the business of the university of the *state* at issue here. "[I]t is elementary that this Court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the State." *Quong Ham Wah Co. v. Industrial Accident Commission*, 255 U.S. 445, 448 (1921). See also, *Six Cos. of Cal. v. Joint Highway Dist.*, 311 U.S. 180 (1940); *West v. American Tel. & Tel. Co.*, 311 U.S. 223, (1940); *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1932); *Kingsley International Pictures Corp. v. Regents of University of New York*, 360 U.S. 684, 688 (1959).

The Postal Service must also accept the state's delineation of the current business of the University. In *United States v. City of St. Louis*, 452 F.Supp. 1147, 1152

⁸ Although not relied upon by the court, HEERA section 3561 (c) emphasizes the need for communication among the staff and supports a determination that the legislative design included use of the most efficient means of communication, the internal mail system. Section 3561 (c) states in pertinent part:

It is the policy of the State of California to encourage the pursuit of excellence in teaching, research, and learning through the free exchange of ideas among the faculty, students and staff of the University of California

Here, William Wilson, a staff member as well as the AFSCME local president, was attempting to communicate with other staff members on matters relating to University labor relations.

(E.D. Mo. 1978), the court recognized the primacy of local authority on certain matters. In that case, the local authority—the city—initially determined whether certain ways were public routes for the purpose of determining, under the postal laws, that those public routes were postal routes.

The foregoing authorities support the contention that the California Court of Appeal's construction of state law is controlling in this case and that no substantial federal question is presented. Without citation to authority, however, UC contends that federal law applies regarding the meaning of "current business," and that "current business" may have a special meaning under federal postal law, different from the state-determined business of UC generally.⁹ Jurisdictional Statement at pp. 19-20. Curiously, the USPS did not assert this point in its Advisory Opinion No. 82-9, relying instead on its purely intuitive view of the University's business. Indeed, the only reference to a USPS definition of "current business" is in Section 16 *Restrictions on Transportation of Letters*, 5th Edition July 1967 (POD Publication 111) (republished June 1973)—"Any busi-

⁹ Despite the recent constriction on state rights under the Tenth Amendment in *Garcia v. San Antonio Metropolitan Transit Authority*, ___ U.S. ___, 105 S.Ct. 1005 (1985), the states still retain considerable authority over the labor relations and missions of local government entities. Significantly, the National Labor Relations Act does not cover state employers, including the University of California. See 29 U.S.C. section 152 (2); *Abood v. Detroit Board of Education*, 431 U.S. 209, 223 (1977). Plainly, nothing in the authorizing statutes of the Postal Service reflects a Congressional intention that the USPS define the business of the University of California.

ness of the carrier is deemed to be its current business when it comes up in such a way as to call for a current communication." This publication, of course, predates the regulations. However, the state-determined business of UC is certainly within the parameters of this Post Office Department definition of "current business."

Thus, in this case, the determination by the California Court of Appeal that the state University's current business includes the fostering of rights guaranteed public employees and employee organizations under state law is dispositive. No substantial federal question is presented because the carriage ordered in this case fits squarely within a recognized exception to the Private Express statutes' prohibition against private mail carriage.

2. Even if federal law were to be applied in defining UC's "current business," federal case law supports the determination that implementation of HEERA rights is related to the current business of the University.

Two distinct lines of federal case law support the determination that implementation of HEERA rights is related to the current business of the University. First, in the First Amendment context, this Court has decided that a union's communications to employees on labor relations matters pertain to the official business of the employer. Second, the few federal cases actually applying the Business of the Carrier exception support a broad interpretation encompassing communications from non-carrier entities on the business of the carrier.

In the context of a public school district, the Supreme Court has viewed the collective bargaining agent as en-

gaging in the "official business" of a school. In *Perry Education Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45, n.7 (1983),¹⁰ the Court endorsed a school district's decision to allow, by contract, an exclusive representative's use of its mail system without affixing postage. This use was consistent with the District's interest in "preserving the property . . . for the use to which it is lawfully dedicated" by allowing the union "to perform effectively its obligations. . . ." *Perry Local Educators' Assn.*, *supra*, 460 U.S. at p. 50. The Court noted that union communications do not need the approval of the school district; such communications in themselves "pertain to the 'official business' of the [district]." *Id.* at n.10.

The University claims that "official business" does not have the same meaning as "current business." While it

¹⁰ The Supreme Court in *Perry* at p. 39, n.1 declined to express an opinion on whether the mail delivery practices involved in the case complied with the Private Express statutes or other Postal Service regulations. The *Perry* Court approved limitation of access to the mail system to the exclusive representative because the mail system was made available only through a collective bargaining agreement with that exclusive representative. Additionally, however, the Court noted at p. 48 that before there was an exclusive representative,

[b]oth unions represented the teachers and had legitimate reasons for use of the system. PLEA's previous access was consistent with the school district's preservation of the facilities for school-related business, . . .

Thus, non-exclusive representatives may also be communicating on school-related business.

The present case arises under HEERA, which affords the statutory right to access to the mail system to "employee organizations," not just exclusive representatives. Moreover, under HEERA even a non-exclusive representative is entitled to meet and confer with the University if employees so request; its communications to employees are also part of the University's official business.

is true that "official business" has special meaning in the First Amendment context, UC fails to explain why the conclusion of *Perry* that union business is "school-related business" (*id.* at p. 48) should not give guidance to courts determining whether union business is "related to the current business" of a university. In *Perry*, the pertinent inquiry was whether the union's communications pertained to the school's business, because if they did so, the mail system could be used without becoming a public forum. If the communications were school-related, the mail system did not lose its insular nature.

Here, too, the Court of Appeal sought to discern if the communications were "school-related" in order to determine if the mail system retained its insular nature. In the context of the Business of the Carrier exception, the inquiry is whether the union's communications to University employees on labor relations with the University can be considered related to the current business of the University. It is difficult, if not impossible, to fathom what possible difference there could be between communications on "school-related business" and communications "related to the current business" of the school.

Second, other federal case law supports a broad interpretation of the exception, allowing communications from non-carrier entities to carrier employees on the business of the carrier. The few court decisions considering the Business of the Carrier exception have held that where there is a level of interdependence between parties to a business relationship, the exception may apply

notwithstanding the fact that they are separate entities. *United States v. Erie Railroad Co.*, 235 U.S. 513 (1914); *United States v. Southern Pacific Co.*, 39 F.2d 433 (D.C. Az. 1928) (by implication). In the *Erie Railroad* case, the railroad, although a distinct business, was interested in the efficient and successful operation of a telegraph business operating along the railroad's lines. Since the letters the railroad carried promoted the successful operation of the telegraph business, the Court concluded that "the business comes within the description of the statute and is 'current.'" 235 U.S. at p. 520.

In the instant case, an interdependent relationship is created by the very nature of a collective bargaining statute like HEERA. The University and AFSCME Local 371 share an interest in facilitating "the development of harmonious and cooperative labor relations between the public institutions of higher education and their employees," *HEERA subsection 3560(a)*. The efficient and effective functioning of the employees' representatives promotes the successful operation of part of the University's business, labor relations. *See* 235 U.S. at p. 520.

B. The Court of Appeal's Construction of State Law Harmonizes the California and the Federal Private Express Statutes, and Poses No Conflict with Federal Interests.

In analyzing allegedly conflicting federal and state regulatory schemes, this Court has said:

Our analysis is also to be tempered by the conviction that the proper approach is to reconcile "the operation of both statutory schemes with one another

rather than holding one completely ousted."

Merrill, Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127 (1973) quoting *Silver v. New York Stock Exchange*, 373 U.S. 341 at 357 (1963).

The Court of Appeal followed this Court's direction to endeavor to reconcile conflicting statutes, rather than ousting either, when it reasonably decided that the statutorily mandated access to UC's internal mail system is allowable because in fact UC would be carrying letters related to its current business. Despite UC's intimations of a preemption problem, such carriage would be no obstacle to the Congressional design, but rather part of the design itself.

Central to this case is the determination that UC's total prohibition against carrying union mail in UC's internal mail system is *unreasonable* if based on the Private Express statutes prohibition, because at least one exception applies.¹¹ See section 3568. If PERB had initially found that the Private Express statutes excep-

¹¹ In determining whether a substantial federal question is presented, it is important to realize that PERB's holding and order relied upon not only the Business of the Carrier exception, but also on the Private Hands Without Compensation exception and the Suspension of the Private Express Statutes for Certain Letters of Faculty and Student Organizations. Because the Court of Appeal did not need to reach these exceptions, PERB will not brief its reasoning in support of its conclusions at this time. However, the Court's judgment is also correctly based on these other rationales. In the event that the Court hears this case, PERB will brief these points fully. See *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-436 (1924); *Peoria & P.U. Ry. v. United States*, 263 U.S. 528, 536 (1924); *Walling v. General Indus. Co.*, 330 U.S. 545, 547, n.5 (1947); *Langnes v. Green*, 282 U.S. 531, 535-539 (1931).

tions did *not* apply, then the University's prohibition would have been a *reasonable* regulation in light of all the circumstances. In either case, the validity of HEERA section 3568 is untouched by the interface with the Private Express statutes. This is a perfect example of appropriate harmonization of state and federal statutory schemes; neither is ousted, both are protected. Accordingly, a substantial federal question is not raised.

C. Employees Need Not be Agents of the University For the Business of the Carrier Exception to Apply.

Skipping past the statute (18 U.S.C. section 1694), the appellant focuses upon the regulation set forth at 39 C.F.R. section 310.3(b), which was first promulgated in 1974. It provides in pertinent part:

- (1) The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the individual actually carrying the letters is not the person sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person (see section 310.3(b) (2)) and the letters must relate to the current business of such person.

* * *

- (3) Separately incorporated carriers are separate entities for purposes of this exception, regardless of any subsidiary, ownership, or leasing arrangement. When, however, two concerns jointly operate an enterprise with joint employees and share directly in its revenues and expenses, either of the concerns may carry the letters of the joint enterprise.

Generally, the regulation implementing the Business of the Carrier exception narrows that statutory exception by adding an additional restriction regarding senders and addressees. The regulation only permits a person or entity to deliver its own letters to another address or to pick up letters addressed to it from another person or entity. Where the carrier is an institution rather than an individual, letters sent by or addressed to its employees must concern the "current business" of that institution and the carriage must be by an officer or employee of the institution. We question whether the narrowing of the statutory exception is valid, but assume for the purposes of argument that it is. However, there is no support for the University's additional requirement that the employees receive communication on University business only as agents of the University.

1. In the instant case, the employees receiving union mail are employees of the carrier within the meaning of the regulation and the content of the mail relates to the business of the carrier.

Assuming *arguendo* that the regulation is an authorized narrowing of the statute, the carriage ordered in this case is still within the law. It is beyond cavil that the employees receive union mail as employees of the University at the University and that the carriage is by employees of the University. It is only because the mail recipients are University employees in the bargaining unit that they receive union representation as part of the labor relations scheme envisioned by the Legislature when it enacted HEERA. Many of them may not be union members at all.

The purpose of the statute and regulation is to exclude from the exception mailed matter unrelated to the carrier. Here, the mail is going to the University, to its employees in their capacity as employees (not, for instance, as individuals needing insurance), and the content of the union communications is clearly related to the business of the carrier, as has been discussed previously.¹² *A fortiori*, the mail carriage contemplated by the Court of Appeal is well within the regulatory as well as statutory ambit of the exception.

2. Contrary to UC's assertion, the business of the carrier exception does not require that the letters be sent to employees in their capacity as agents of the carrier.

As previously demonstrated, the communications at issue here are squarely within the Business of the Carrier exception to the Private Express Statutes. Since no substantial federal question is raised, this Court's inquiry should be at an end. However, because UC has posited that an agency requirement must also be met, we here explain why this is not so.¹³

¹² Here, two different requirements are met which bring the communications into the exception. The employee receives mail as an employee and the mail is related to the business of the carrier. In contrast, UC's hypothetical about the Director of Admissions receiving an insurance solicitation (Jurisdictional Statement at pp. 13-14) fails to meet either requirement. He receives the mail as an individual and the mail is not about University business as defined by the Legislature.

¹³ The University's argument that the employees must receive letters as *agents* of the University was entirely absent in the University's brief to the California Supreme Court. It appears for the first time in the Jurisdictional Statement at p. 13. Nor has UC consistently required an agency relationship when outside entities communicated with employees through its internal mail system. The record in this case shows that, for instance, the University allowed Bank of America to use its internal mail system at the Lawrence Livermore Laboratory, Certified Record Supplement at 521-523,

The added requirement of agency is simply not found in the statute creating the exception for letters related to the business of the carrier. Additionally, the regulation does not address the capacity of the recipient; it addresses the capacity of the *carrier* in order to prevent a subcontractor from carrying mail for an entity in competition with the Postal Service. A university can only receive mail through its employees; management employees are not the only employees who make up the entity, the university. When staff at a university receive communications on the business of the university, the intent of the regulation and the statute is complied with.

While an agency's interpretation¹⁴ of its regulation based on its operative statute normally is entitled to judicial deference, it is neither necessary nor proper for a court to defer to an agency regulation that is inconsistent with the system under which it was promulgated.

531 and 611, and in that instance the University had not sent out the communication "under the auspices of the Chancellor's office" as it had with other outside organizations, such as the United Way. Certified Record at 254, 312.

¹⁴ It is not absolutely clear that the USPS embraces the University's contention that the employees must receive letters as agents of the University. The word "agent" is not in any Advisory Opinion PERB has seen. Most of the relevant Advisory Opinions speak in terms of employees. See Ad. Op. PES 74-2, 74-7, 75-10, 76-9, 78-9. In Ad. Op. PES 82-9, the USPS has tried to distinguish employees *qua* employees from employees as union members. As previously noted, this distinction is inapplicable to the HEERA context. Under HEERA, union members and nonunion members alike receive the labor union mail because they are employees.

United States v. Larionoff, 431 U.S. 864, 873 (1977).¹⁵ No deference is due particularly when the regulation is restrictive of the statute. See *Scofield v. Lewis*, 251 F.2d 128 (5th Cir. 1958) (Internal Revenue Commissioner cannot limit Congressional design through regulation); *In the Matter of Commission Policy Concerning the Non-Commercial Nature of Education Broadcast Stations*, 90 F.C.C.2d 895 (1982) (F.C.C. rule restricts public broadcasters in fund raising activities in a manner inconsistent with statute). Regulatory restrictions are particularly frowned upon because they will likely undermine other rights.

The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations . . . but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail.

Ex Parte Jackson, 96 U.S. 727, 732 (1878).

See, e.g., *United States v. City of St. Louis*, 452 F.Supp. 1147 (E.D. Mo. 1978) in which the federal court held

¹⁵ As this Court said in *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936):

The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

See Also *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-214 (1976); *Dixon v. United States*, 381 U.S. 68, 74 (1965); *Lynch v. Tilden Produce Co.*, 265 U.S. 315 321 (1924).

that a Postal Service rule could not override the property rights of citizens. In that case, a city ordinance prohibiting post office employees from cutting across lawns was upheld despite a Post Office Department rule allowing shortcuts.

Accordingly, this Court must examine 18 U.S.C. section 1694 as written, not as the Postal Service may have interpreted it, to determine whether there is any basis upon which to add the additional requirement that the receiver of the letter must be the agent of the carrier. The requirement of agency is not apparent within the plain words of the statute. The statute speaks only of the necessity for the letters to be related to the business of the carrier.

Nor does the major case concerning the exception, *United States v. Erie Railroad Co.*, *supra* at p. 13, support the novel contention that an agency relationship must be present for the exception to be applicable. In the *Erie Railroad* case, the superintendent who sent the letters and the station master who received them were joint employees of the railroad and the telegraph company.¹⁶ The content of the letters, however, makes it strikingly clear that both employees were acting in their capacity as employees of the *telegraph company* when the transmission took place. Nonetheless, the Court held that the

¹⁶ It must be recalled that this broad interpretation of the business of the carrier came before the regulation specifically allowing carriage of letters of joint enterprises. 39 C.F.R. section 310.3(b) promulgated September 16, 1974 and amended September 11, 1979 and September 11, 1980.

letters were sufficiently related to the *business of the railroad* to come within the statutory exception. The Court did not find it necessary to discuss "agency". See 235 U.S. at pp. 516-517.

The Supreme Court's broad interpretation in *Erie* of what constitutes the business of the carrier is in keeping with Congressional intent, although various opinions of the Attorney General may take a narrower view. On March 3, 1909, the Conference Report on the revision of the Penal Code, including those sections regarding the postal laws, set forth quite clearly what the Business of the Carrier exception permitted.

[It] permits a common carrier to which a mail coach is attached to transmit by its servants to other stations on its route communications not enclosed in the mail, if such communications are confined to the carrier's business.

43 Cong. Rec. 3789-3790 (60th Cong., 2d Sess., March 3, 1909).

In sum, to the extent that the regulation must be read to require that employees receive mail as agents of the University, as opposed to simply as employees of the University receiving mail related to the current business of the University, the regulation unlawfully narrows the ambit of the authorizing statute. We believe an agency requirement is not present in the regulation.

II. THIS CASE DOES NOT PRESENT IMPORTANT QUESTIONS OF FEDERAL LAW WHICH REQUIRE RESOLUTION NOW.

This case does not present a substantial federal question, and, by a parity of reasoning, should not be deemed a meritorious petition for a writ of certiorari for several reasons in addition to the correctness of the Court of Appeal's decision.

First, our research reveals no conflicting court determinations on the applicability of the exception within 18 U.S.C. section 1694 to public sector unions using the internal mail system of an employing entity. Indeed, our research reveals only this case reported as dealing with 39 C.F.R. section 310.3(b) at all.

Second, the case arises in a state law context between two state agencies; the USPS is not an actual party in the cause. Neither the California Court of Appeal nor any party has directly attacked the Private Express statutes or the regulations. Nor is this a case in which the Postal Service is trying to enforce the Private Express statutes directly. On the other hand, a case *is* pending in federal district court in the District of Columbia involving a direct challenge to the Postal Service's interpretation of 18 U.S.C. section 1694 to prohibit employee unions from using school district internal mail systems. See *National Education Association v. Bolger*, Civ. No. 82-2320 (D.C. D.C., filed August 18, 1982). Thus, the legality of the Postal Service's interpretation of 18 U.S.C. section 1694 and 39 C.F.R. 310(b) is now being litigated in a context unclouded by the state law questions that are central herein. If the federal question in *Bolger* is not satisfactorily resolved by the federal trial and appellate courts,

this Court will have an opportunity to decide it.

Third, there are strong reasons to doubt UC's argument that the decision of the Court of Appeal will lead to a widespread diversion of USPS revenue.¹⁷ The decision of the Court of Appeal was explicitly based on the unique statutory components of HEERA and the evident intent of the California Legislature in enacting HEERA. The decision can provide no shelter under the Business of the Carrier exception for unions operating outside of HEERA's provisions. No other party will benefit from the Court of Appeal decision unless it too can bottom its claim on a legislative determination that the carrier it seeks to use to reach the carrier's employees shares a business interest with it. Any such claim will of course be subject to challenge and review.

Finally, assuming *arguendo* that no current exception allows union access to the University's mail system, this case might still be better resolved outside the court system. The Postal Service does have the ability to suspend its regulations, and the prohibition on the private carriage of mail, in the public interest. 39 U.S.C. section 601(b). If it is true that school districts want to allow employee unions to use their mail systems (Jurisdictional Statement at p. 10) and that a substantial number of states have legislated such access, then this issue is best

¹⁷ Indeed, we know of no case in which the Postal Service is in court to enforce its interpretation of the Business of the Carrier exception in a similar factual context; this reality significantly undercuts any claims of the importance of this revenue loss to the Postal Service.

resolved by the Postal Service responding to the public by allowing such private carriage.

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this case depends is so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or in the alternative, to affirm the correct judgment of the California Court of Appeal.

Respectfully submitted,

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February 6, 1987

APPENDIX 1
California Government Code References

3560

The Legislature hereby finds and declares that:

(a) The people of the State of California have a fundamental interest in the development of harmonious and cooperative labor relations between the public institutions of higher education and their employees.

(b) All other employees of the public school systems in the state have been granted the opportunity for collective bargaining through the adoption of Chapter 10.3 (commencing with Section 3512) and Chapter 10.7 (commencing with Section 3540), and it would be advantageous and desirable to expand the jurisdiction of the board created thereunder to cover the employees of the University of California, Hastings College of the Law, and the California State University. These institutions of higher education have their own organizational characteristics.

(c) The people of the State of California have established a system of higher education under the Constitution of the State of California with the intention of providing an academic community with full freedom of inquiry and insulation from political influence in the administration thereof. In so doing, the people have caused to be created the regents to govern the University of California, a board of directors to govern Hastings College of the Law, an affiliate of the University of

California, and a board of trustees to govern the California State University.

(d) The people and the aforementioned higher education employers each have a fundamental interest in the preservation and promotion of the responsibilities granted by the people of the State of California. Harmonious relations between each higher education employer and its employees are necessary to that endeavor.

(e) It is the purpose of this chapter to provide the means by which relations between each higher education employer and its employees may assure that the responsibilities and authorities granted to the separate institutions under the Constitution and by statute are carried out in an atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them. It is the intent of this chapter to accomplish this purpose by providing a uniform basis for recognizing the right of the employees of these systems to full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of representation in their employment relationships with their employers and to select one of these organizations as their exclusive representative for the purpose of meeting and conferring.

3561 (c)

(c) It is the policy of the State of California to encourage the pursuit of excellence in teaching, research, and learning through the free exchange of ideas among the

faculty, students, and staff of the University of California, Hastings College of the Law, and the California State University and Colleges. All parties subject to this chapter shall respect and endeavor to preserve academic freedom in the University of California, Hastings College of the Law, and the California State University and Colleges.

3568

Subject to reasonable regulations, employee organizations shall have the right to access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act.

3570

Higher education employers, or such representatives as they may designate, shall engage in meeting and conferring with the employee organization selected as exclusive representative of an appropriate unit on all matters within the scope of representation.

REPLY BRIEF

FEB 13 1987

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Appellee,

and

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL
EMPLOYEES, LOCAL 371, and WILLIAM H. WILSON,
PRESIDENT, LOCAL 371,
Appellees.

On Appeal from the Court of Appeal of the State of
California, First Appellate District

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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17/1/87

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No. 86-935

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1986

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Appellee,

and

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 371, and WILLIAM H. WILSON,
PRESIDENT, LOCAL 371,
Appellees.

**On Appeal from the Court of Appeal
of the State of California,
First Appellate District**

BRIEF IN OPPOSITION TO MOTION TO DISMISS

INTRODUCTION

The Motion to Dismiss filed by PERB in this appeal fails to meet head-on the arguments raised by the University in its Jurisdictional Statement. It begins by erroneously contending that this appeal does not fall within the appellate jurisdiction of the Court, when the jurisdictional statute and this Court's precedents make clear that this is a proper appeal. Moreover, contrary to PERB's suggestions, this case presents an issue of federal law in pristine form — whether the federal Private Express statutes and implementing regulations prohibit the University from carrying, in its internal mail system, unstamped mail from labor unions to University employees.

PERB also suggests that even if this is an issue worthy of review by the Court, it should be resolved in a different case. But PERB assumes erroneously that the legal issue would be presented in a different context in that case, and fails to take account of the fact that dismissal of this appeal would constitute a resolution of the issue on the merits.

The two principal points on the merits raised in the University's Jurisdictional Statement are not effectively rebutted by PERB's Motion to Dismiss. PERB suggests that the question of what constitutes the "current business" of the University within the meaning of the federal statute is a matter of state law, which cannot be examined by this Court. It further argues, without reference to the language of the regulation, that the regulation imposes no requirement that letters sent to employees of the carrier be sent to them as agents of the University.

This appeal presents a substantial question of law: whether a state statute, as interpreted, conflicts with federal law and is therefore preempted. The United States Postal Service — the agency charged with enforcement of the federal law — has directly opposed the position taken by PERB and the California Court of Appeal. It is important to note that the rationale employed by the Court of Appeal is not limited simply to the University; instead, the court's reasoning applies to virtually all public and private institutions across the nation. The court's broad view of who is a proper recipient of letters under the Letters of the

Carrier exception and of what constitutes the "current business" of the carrier virtually guarantees that if the Court of Appeal's judgment is converted into binding precedent by this Court, hundreds of thousands, if not millions, of pieces of mail will be transmitted each year without postage.

ARGUMENT

I.

THE COURT HAS JURISDICTION OVER THIS APPEAL PURSUANT TO 28 U.S.C. §1257(2).

PERB's Motion to Dismiss suggests that this case does not fall within the mandatory appellate jurisdiction of this Court for two reasons: (1) the University did not "expressly recit[e]" that HEERA, as applied, is repugnant to the law; and (2) only a state agency's finding is at issue, rather than the validity of a statute. Motion to Dismiss at 3 n.4. Neither of these arguments is substantial.

As to the first, PERB relied upon this Court's opinion in *Rohr Aircraft Corp. v. County of San Diego*, 362 U.S. 628, 629 (1960). That case held that where a taxpayer did not contend in state court that a state statute as applied was repugnant to the Constitution, but rather contended only that a local tax assessment would violate his federal rights, privileges, or immunities, an appeal would not lie. In contrast, the University argued below that if §3568 of the California Government Code is interpreted to require the University to carry the unstamped letters of labor unions, then it conflicts with federal law and is therefore preempted. PERB's argument apparently distills down to the proposition that the University's use of words such as "conflict," "inconsistent," and "preempted," rather than the word "repugnant," defeats its right to invoke the appellate jurisdiction of this Court. Needless to say, PERB has not, and cannot, offer any authority for such a proposition.¹

¹In any event, the Court of Appeal expressly decided the issue of whether the state law as interpreted conflicted with federal law, rendering moot the issue of whether it had been raised below. See *Illinois v.*

PERB's second suggestion, that what is at issue here is only a state agency's finding, rather than the validity of a state statute, is without foundation. At issue in this case is the California Court of Appeal's *conclusion of law* that there is no conflict between California Government Code § 3568, as interpreted, and the federal Private Express statutes and regulations promulgated thereunder.² Such an issue clearly falls within the ambit of 28 U.S.C. § 1257(2).

II.

THIS APPEAL PRESENTS A SUBSTANTIAL FEDERAL QUESTION.

Notwithstanding the fact that both the California Court of Appeal and PERB held in prior proceedings in this case that HEERA, as interpreted, did not conflict with the Private Express statutes, PERB presents its arguments in such a way as to imply that the issues presented in this action are issues of state law. Yet, PERB does not dispute that the question whether a state law is preempted by a federal law is a federal question.

In its Jurisdictional Statement the University argued that federal interests have been totally subordinated to perceived state interests by both PERB and the Court of Appeal. In its Motion to Dismiss, PERB continues to exhibit a misunderstanding of the relationship between the state and federal governments. Despite the fact that federal law is supreme in areas in which the federal government is constitutionally empowered to act, PERB apparently believes that the federal government is obligated to defer to the State of California on matters of federal law. Thus, it suggests that the Postal Service has exhibited a "shocking indifference" to the determinations of state courts, Motion to Dismiss at 5, and

Gates, 462 U.S. 213, 218 n.1 (1983) (federal claim can be considered if it was *either* raised in state court or decided by the state court).

²It is well established that under § 1257(2) an appeal will lie from both decisions rejecting facial challenges to state statutes and decisions rejecting "as applied" challenges. See *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-441 (1979).

that federal courts "must accept" the determination of state courts concerning what constitutes the "current business" of the University under the Private Express statutes, *id.* at 8.³ Finally, in what may be an unprecedented argument in this Court, PERB suggests that even if the Court of Appeal was incorrect in its interpretation of federal law, the appropriate resolution of this issue is not for the state to conform to federal law, but rather for the Postal Service to modify its regulations. Motion to Dismiss at 23. While such an argument might have some merit if Article VI of the United States Constitution is repealed, until such time as it is, the states must modify their laws to conform to federal law, not *vice versa*.

PERB also suggests that another case, *National Education Association v. Bolger*, Civ. No. 82-2320 (D.D.C. filed August 18, 1982), might be a more appropriate vehicle for this Court to consider the scope of the Private Express statutes, because the Postal Service is not a party to this action and because questions of state law are central to the disposition of this case. PERB is wrong, for at least three reasons. First, there is no reason to think that the Postal Service's participation as a party in *NEA* would alter or clarify the issues present in this case and in *NEA*. The Postal Service did participate as *amicus curiae* below and its position is quite clear. Second, *NEA* is clearly not a more appropriate vehicle for the resolution of issues raised by this appeal, because if this Court dismisses this appeal, the dismissal

³ The University has no quarrel with PERB's argument that federal courts must defer to state courts on questions of *state* law, *see* Motion to Dismiss at 8, but that argument would be more apposite if the University were asking this Court to review the Court of Appeal's interpretation of HEERA. The University does, however, take issue with PERB's suggestion that interpretation of the phrase "current business" in a federal statute is a question of state law that cannot be questioned by federal courts.

It should be noted that even if PERB were correct that the question of what constitutes the "current business" of the University is entirely a matter of state law, the Court of Appeal's decision still merits reversal because of its failure to recognize the agency requirement of the Letters of the Carrier exception. *See* Section V, *infra*.

will be binding precedent on the District Court and the Court of Appeals in *NEA*. *See Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975) (summary dismissals for want of a substantial federal question and summary affirmances are binding precedents that lower courts are not free to disregard). For the same reason, the existence of a conflict is not necessary to justify appellate review by this Court, because if this appeal is dismissed, no conflict can develop so long as lower courts heed this Court's pronouncement in *Hicks*. Third, the suggestion that the *NEA* case can resolve the issue raised by this case is fundamentally inconsistent with PERB's primary argument for dismissal, which is that the question raised (whether PERB's order conflicted with federal law) is a matter of state law and is a product of "the unique statutory components of HEERA." Motion to Dismiss at 23. PERB's claim that the *NEA* case will present the issue "in a context unmuddled by the state law questions that are central herein," is odd, given PERB's parallel assertion that, at least with respect to public universities, the determination whether the letters relate to the "current business" of the institution will always be controlled by state law.

The same tolerance for opposing viewpoints is again presented by PERB's argument that, first, this appeal raises no substantial federal question but concerns issues of state law only, and second, that the federal regulation, 310.3(b), is *ultra vires* and invalid if it means what the Postal Service and the University contend it means. That PERB's latter argument can coexist with the absence of a substantial federal question is at least puzzling, unless it is PERB's contention that the invalidity of the federal regulation is also a matter of state law.

PERB argues that the decision of the Court of Appeal will have limited effect, even if this Court effectively affirms that decision by dismissing this appeal. Motion to Dismiss at 23. But the rationale of the Court of Appeal would apply far beyond the University. The Court was interpreting the phrase "other means of communication" in section 3568 of HEERA, and relied on very general language of legislative intent concerning "harmonious and cooperative labor relations." Cal. Gov't Code §3560. This goal is not unique to HEERA, but is common to most laws

regulating labor relations. See, e.g., National Labor Relations Act, 29 U.S.C. §141. Thus, the decision below very seriously threatens Postal Service revenue by providing a rationale applicable to many internal mail systems reaching millions of employees.⁴

III.

WHERE THERE IS A CONFLICT BETWEEN STATE AND FEDERAL LAW, FEDERAL LAW PREVAILS.

The rule is clear that state law is preempted by federal law whenever the "challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Perez v. Campbell*, 402 U.S. 637, 649 (1971) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Against this clear rule of law, PERB cites a decision of the District Court for the Eastern District of Missouri having to do with shortcuts by employees of the Postal Service across property owned by residents of the City of St. Louis. *United States v. City of St. Louis*, 452 F. Supp. 1147 (E.D.Mo. 1978), *rev'd in part on other grounds*, 597 F.2d 121 (8th Cir. 1979).⁵ PERB might have found its own shortcut to resolution of this specific issue by considering *United States v. City of Pittsburgh*, 661 F.2d 783 (9th Cir. 1981). There, the Ninth Circuit held unconstitutional a city ordinance forbidding letter carriers to take shortcuts on the ground that it was preempted by federal law.

⁴ The University of California alone has approximately 100,000 employees.

⁵ In *City of St. Louis*, the district court ruled that a city ordinance concerning trespass must prevail over postal regulations permitting carriers to take shortcuts in order to deliver mail more efficiently. The Eighth Circuit reversed in part, holding that the district court's ruling erroneously interpreted the city ordinance. The Eighth Circuit found that the city ordinance and the federal regulation had the same effect because both permitted carriers to cross lawns in the absence of customer objections, so it had no occasion to examine the district court's resolution of the conflict issue. *United States v. City of St. Louis*, Branch 343, *supra* at 124-125.

IV.

FEDERAL LAW DOES NOT SUPPORT THE CALIFORNIA COURT'S FINDING THAT UNION LETTERS ARE THE "CURRENT BUSINESS" OF THE UNIVERSITY.

PERB contends that "even if" federal law governs the issue whether the union letters relate to the current business of the University within the meaning of the Private Express statutes, two federal cases support the Court of Appeal's decision.

PERB relies first on *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), for the proposition that this Court has determined that union communications constitute the "official business" of a school district. The University has previously explained why First Amendment cases using the phrase "official business" are inapposite. Jurisdictional Statement at 18-19. The "official business" of the government for the First Amendment purposes of *Perry* is not the same as the current business or the "official business" of the government for purposes of the Postal statutes. Thus, one would not look to *Perry*, but to Postal laws to determine whether it would violate 18 U.S.C. § 1719 for a union representing the Supreme Court police force to use Supreme Court envelopes bearing the legend:

<p>OFFICIAL BUSINESS PENALTY FOR PRIVATE USE \$300</p>
--

The second case relied upon by PERB is *United States v. Erie Railroad*, 235 U.S. 513 (1915), which dealt with the availability of the Letters of the Carrier exception to joint enterprises. In its Jurisdictional Statement, the University speculated that not even PERB would contend that the University and the union are engaged in a joint enterprise, and argued that in the absence of such a joint enterprise, this Court's decision in *Erie Railroad* would not be relevant to this case. Jurisdictional Statement at 18. The University's confidence in PERB's realism, however, appears to have been misplaced, as PERB actually does contend that the University and the union "shar[e] a business interest." Motion to

Dismiss at 13. Therefore, it argues, *Erie Railroad* is directly on point. However, as explained in the University's Jurisdictional Statement, the University and the union stand in an arm's-length (or even adversarial) relationship and can in no sense be deemed parties to a joint enterprise. Jurisdictional Statement at 15. In any event, the "joint enterprise" exception is codified separately in 39 C.F.R. 310.3(b)(3) and requires that the joint enterprise operate with joint employees and that the parties share revenue and expenses. That quite obviously is not the case here.

V.

FOR THE LETTERS OF THE CARRIER EXCEPTION TO APPLY, THE INDIVIDUAL CARRYING THE LETTERS MUST BE AN EMPLOYEE OF THE PERSON SENDING OR RECEIVING THE LETTERS.

As demonstrated in the University's Jurisdictional Statement, the Letters of the Carrier exception requires that incoming letters be addressed either to the University directly or to the University through an agent.⁶ The regulation embodying that exception is unambiguous: "If the individual actually carrying the letters is not the person . . . to whom the letters are addressed, then such individual must be an officer or employee of such person . . ." 39 C.F.R. § 310.3(b)(1). Thus, the individual carrier must be an employee of the recipient of the letter. This is clearly the case when the letter is sent to the University, but it is equally clearly not the case when the letter is sent to a person not in his capacity as a representative of the University, but in some other capacity, such as that of a potential voter in a representation election.⁷

⁶ PERB attempts by sleight of hand to convert the Letters of the Carrier exception into the "Business of the Carrier" exception. Motion to Dismiss at 4 n.5. But, just as it is beyond the authority of the California courts to repeal federal law in favor of state law, it is beyond PERB's authority to try to salvage its argument by renaming a federal regulation.

⁷ That the employee can act in that capacity only if he is an employee of the University does not make him an agent of the University when he receives the letter. See Jurisdictional Statement at 14, 15.

In arguing that there is no agency requirement inherent in the regulation, PERB relies not upon the language of the regulation, but rather upon the "intent" and "purpose" of the regulation, which it divines from an unidentified source. See Motion to Dismiss at 17, 18. To the limited extent that PERB considers the language of the regulation at all, it makes clear that the University's position is the correct one. PERB states: "the regulation does not address the capacity of the recipient; it addresses the capacity of the *carrier* . . ." Motion to Dismiss at 18. That statement is only half-correct because what the regulation says about the capacity of the carrier is intimately related to the capacity of the recipient — the regulation provides that the carrier must be an officer or employee of the recipient. Thus, if an employee of the University carries letters, the University must be the recipient of the letters.

PERB suggests that the Postal Service may not share the University's view that the Letters of the Carrier exception contains an agency requirement. But the Advisory Opinion issued to the University by the Postal Service states that University employees "may carry without payment of postage letters sent by or addressed to members of the staff or faculty *in their official capacity as representatives of the employer University*." App. 9, A-73. Concededly, the Postal Service did not use the word "agent," using instead the phrase "official capacity as representatives," but PERB fails to suggest any way in which these two terms might differ in meaning. However his capacity is described, what matters is that the addressee must receive the letter *on behalf of* the University.

Finally, PERB says that if the Letters of the Carrier regulation contains an agency requirement it constitutes an impermissible narrowing of the statute. PERB is simply wrong. This argument was neither raised below nor passed upon by the Court of Appeal,⁸ and we do not feel that it would be appropriate to devote

⁸ However, contrary to PERB's assertion, Motion to Dismiss at 17 n.13, the presence of an agency requirement in the regulation was before the Court of Appeal, as the Advisory Opinion of the Postal Service makes clear.

much argument to it at this point. Suffice it to say that the regulation does not narrow the statutory exception; instead, it makes explicit the breadth of the exception by recognizing the special needs of institutional carriers. Section 1694 uses the language, "[w]hoever . . . carries, otherwise than in the mail, any letters or packets, except such as relate to . . . the current business of the carrier. . . ." A narrow application of the statutory language would mean that an individual carrier could carry only his own letters. The regulation makes clear that he also may carry the letters of his employer if the two requirements of the regulation are met.

In sum, the regulation means what it says on its face, which is the meaning ascribed to it by both the United States Postal Service and the University. PERB's interpretation of the regulation simply ignores its language and its history.

CONCLUSION

For the reasons set forth above and in appellant's Jurisdictional Statement, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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February 12, 1987

AMICUS CURIAE

BRIEF

(4)
No. 86-935

Supreme Court, U.S.
FILED

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ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the delivery by a university of unstamped mail from a labor union to university employees violates the Private Express Statutes.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's
order inviting the Solicitor General to express the
views of the United States.

STATEMENT

1. In 1979 the American Federation of State,
County, and Municipal Employees (the Union) filed
an unfair labor practice charge against appellant,
the Regents of the University of California. The
gravamen of this charge was that the University of

California at Berkeley had refused to permit the Union to use the internal campus mail system to send unstamped Union letters to the University's custodial employees at their places of work (J.S. App. A2). The Union contended that this refusal to deliver its letters violated its right of access to the employer's "means of communication" under the California Higher Education Employer-Employee Relations Act, Cal. Gov't Code §§ 3568, 3571 (West 1980) (*re-printed at J.S. App. A115*).

The University declined to deliver the Union's letters because it believed that such delivery would violate the Private Express Statutes (18 U.S.C. 1693-1699; 39 U.S.C. 601-606). These statutes generally prohibit the carriage of letters over post routes without payment of the postage that would be required if the letters were carried by the United States Postal Service (USPS).¹ In operating its internal system for delivery of unstamped campus mail, the University relies on a statutory exception to the Private Express Statutes for so-called "letters of the carrier" (18 U.S.C. 1694; 39 C.F.R. 310.3 (b)), supplemented by a regulatory suspension of those statutes' operation "for letters of * * * bona fide student or faculty organizations" (39 C.F.R. 320.4). See J.S. App. A73, A74.²

¹ It is undisputed that the University delivers mail over post routes. The University's internal mail system delivers mail to approximately 150 locations on the Berkeley campus, and the Postal Service delivers mail to approximately 50 locations on the campus. J.S. App. A26-A27.

² The Postal Service is authorized by 39 U.S.C. 601(b) to suspend the operation of the Private Express Statutes "where the public interest requires the suspension." The Postal Service has promulgated regulations suspending the operation of

In a 1982 opinion letter (see 39 C.F.R. 310.6), the Postal Service advised the University that neither of these exceptions would permit it to deliver unstamped mail from the Union to the University's custodial employees. J.S. App. A66-A75. The Postal Service explained that the letters-of-the-carrier exception "permits an employer to deliver his own letters on his own current business," and that this exception would authorize delivery of unstamped employee mail only if such letters were "sent by or addressed to members of the staff or faculty in their official capacity as representatives of the employer University" (*id.* at A72, A73). The opinion cited prior USPS opinions which had concluded that a school board's carriage of letters from a labor union to school district employees would not qualify for the letters-of-the-carrier exception. This conclusion was based on the fact that union letters to employees "can in no sense be regarded as sent by or addressed to the carrier-District," and that such letters in any event "do not relate to the current business of the school board (the carrier), but, rather to the current business of the unions with which the board deals" (*id.* at A73).

The Postal Service similarly concluded that the letters-of-the-carrier exception would not cover the University's delivery of the Union's mail here (J.S. App. A74). The opinion further advised that the regulatory suspension recognized "for certain letters of college and university organizations" was likewise unavailable (*id.* at A74-A75). "Th[at] suspension,"

the Statutes in a number of situations, including the suspension discussed in the text and an unrelated suspension for "extremely urgent letters" (39 C.F.R. 320.6). It is the latter suspension that covers the operations of various privately operated same-day and overnight delivery services.

the Postal Service explained, "was intended to cover the letters of student and faculty organizations which serve the campus community but which technically are not a part of the university itself, and, therefore, are not eligible" for the letters-of-the-carrier exception (*id.* at A76). The Postal Service concluded that a labor union seeking to represent a University's custodial workers "is neither a student nor a faculty organization" (*id.* at A75). Finally, the opinion letter advised that the statutory exception for carriage by "private hands without compensation" (18 U.S.C. 1696(c); 39 C.F.R. 310.3(c)) could not be construed to apply. Since the Union and the University dealt with each other at arm's length, the Postal Service concluded that "the carriage contemplated here is in no sense a gratuitous act" (J.S. App. A72).

2. In response to the Union's unfair labor practice charge, the California Public Employment Relations Board ruled that the University must permit the Union to use the campus mail system without payment of postage, notwithstanding the Postal Service's advisory opinion (J.S. App. A14-A47). The Board first concluded that Section 3568 of the California Government Code requires state universities to provide access to their internal mail systems free of charge to unions representing or seeking to represent university employees (J.S. App. A18-A20). The Board then held that the University had no reasonable basis for denying such access, rejecting its argument "that federal postal statutes and regulations prohibit it from carrying unstamped [union] materials" (*id.* at A25). The Board asserted that the Postal Service had given the letters-of-the-carrier exception too narrow a reading (*id.* at A38), stating that the exception should apply whenever a letter concerns the "business" of the carrier, a term that

the Board construed broadly to include any matters affecting labor relations (*id.* at A38-A39). The Board alternatively ruled that the "private hands without compensation" exception to the Private Express Statutes would authorize the carriage here, and that the regulatory suspension for letters of student and faculty organizations would be constitutionally suspect if it were not construed to authorize the same result.³

The California court of appeal affirmed the Board's order, rejecting the University's argument that the carriage in question "is prohibited by the Private Express Statutes," and holding "that no conflict exists between the [California statute] and federal postal regulations" (J.S. App. A4, A7). The court accepted the Board's conclusion (see *id.* at A6) that California Government Code Section 3568 required the University to deliver the Union's mail free of charge. The court then held that such carriage was authorized by the letters-of-the-carrier exception; it therefore found no need to address the alternative grounds on which the Board had based its decision (*id.* at A6-A7).

³ It appears that the Board, having concluded that California law required the University to deliver the union's unstamped mail, was compelled to conclude that federal law did not bar that outcome. The Board noted that the court of appeal had previously instructed it that, under the California Constitution, it lacked power to declare a state statute unenforceable under federal law (J.S. App. A16 & n.2). Indeed, the court of appeal had previously instructed the Board that under a recent constitutional amendment adopted by the California electorate, state agencies may not decide that a state law is "unenforceable by reason of preemptive federal postal law" (*id.* at A63 (emphasis added)). The court of appeal had nonetheless instructed the Board that it remained free to consult and interpret the relevant federal postal provisions (*id.* at A64).

Ignoring the Postal Service's opinion that the letters-of-the-carrier exception applies only to letters sent by or addressed to employees in their capacity as representatives or agents of the employer, the court deemed it sufficient that a letter be sent to the employee "in his or her capacity as an employee" and that it relate to the "current business" of the employer-carrier (*id.* at A8-A9). The court then held that the Union's letters to University employees related to the "current business of the carrier" as that term is used in 18 U.S.C. 1694, reasoning that California law aims to foster "harmonious labor relations" between state universities and their workers (J.S. App. A10-A12).

The California Supreme Court denied the University's petition for review, Justice Lucas dissenting (J.S. App. A13).

DISCUSSION

The California Court of Appeal erred in holding that the Private Express Statutes do not bar the Board's application of California Government Code Section 3568 to require delivery of the Union's unstamped mail. As the Postal Service has consistently ruled, letters sent by a union and delivered through an employer's internal mail system to current or prospective union members are not "letters of the carrier" under 18 U.S.C. 1694 and 39 C.F.R. 310.3(b). Such letters are not sent to or received by a representative of the carrier, and such letters do not relate to the carrier's current business. Delivery of such letters, moreover, is not authorized by 39 C.F.R. 320.4, which covers letters of "bona fide student or faculty organizations," or by 18 U.S.C. 1696(c) and 39 C.F.R. 310.3(c), which concern carriage by "private hands without compensation." Because the state

court rejected the claim that the California statute as thus applied is repugnant to federal law, and because there is a substantial question as to the validity of that decision, we believe that this Court should note probable jurisdiction of the appeal under 28 U.S.C. 1257(2).

1. Contrary to appellee's suggestion (Mot. to Aff. 3 n.4), the University has properly invoked this Court's appellate jurisdiction. Section 1257(2) provides that an appeal lies from the decision of a state court "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." This Court has "held consistently that a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 441 (1979). Accord, *e.g.*, *Rose v. Rose*, No. 85-1206 (May 18, 1987), slip op. 4 n.3; *McCarty v. McCarty*, 453 U.S. 210, 219-220 n.12 (1981); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 112-113 (6th ed. 1986). Appellant in the instant case squarely argued that Section 3568 of the California Government Code could not constitutionally be applied to compel the University to deliver the Union's unstamped mail because the Private Express Statutes prohibit that carriage. The California court of appeal rejected that argument, upholding Section 3568 as applied. Accordingly, this is an appeal.

2. a. The court of appeal misconstrued the letters-of-the-carrier exception in a way that undermines

the purpose of the Private Express Statutes. Congress enacted those statutes pursuant to its constitutional authority to establish "Post Offices and post Roads" (U.S. Const. Art. I, § 8, Cl. 7). The statutes are designed to facilitate the nationwide delivery of mail by protecting the Postal Service's monopoly on the carriage of letters, and hence the revenues of the Postal Service. See *Ex parte Jackson*, 96 U.S. (6 Otto) 727, 735 (1878); *United States v. Bromley*, 53 U.S. (12 How.) 87, 96-97 (1851); *United States Postal Service v. Brennan*, 574 F.2d 712, 713-715 (2d Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

This Court summarized the history and purpose of the Private Express Statutes in *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 122 (1981), as follows:

[E]xpenditures began exceeding revenues as early as the 1820's as the postal structure struggled to keep pace with the rapid growth of the country westward. Because of this expansion, delivery costs to the South and West raised average postal costs nationally. To prevent competition from private express services, Congress passed the Postal Act of 1845, which prohibited competition in letter mail and established what is today referred to as the "postal monopoly."

The Private Express Statutes, the lineal descendants of the Postal Act of 1845, are thus designed to protect the postal monopoly by preventing private carriers from competing selectively with the Postal Service on its most profitable routes, competition that Congress has concluded would have the undesirable effect of driving up the cost of mail service generally.

Several exceptions to the statutory postal monopoly permit limited carriage of letters by entities other than the Postal Service. The foundation for the letters-of-the-carrier exception is 18 U.S.C. 1694. That section prohibits the private carriage of letters over postal routes with a number of exceptions, including an exception for such letters "as relate * * * to the current business of the carrier." That language was introduced into Rev. Stat. § 3985, the predecessor of Section 1694, in 1909, and was based upon an 1896 opinion of the Attorney General. In that opinion, the Attorney General concluded that Congress in enacting the Private Express Statutes had not intended to bar common carriers from transporting their own letters, even though the language of Rev. Stat. § 3985 did not explicitly so provide. The Attorney General had emphasized that the implied exception was a narrow one: "The right is to carry letters written and sent by the officers and agents of the railroad company which carries and delivers them, about its business, and these only." 21 Op. Att'y Gen. 394, 399 (1896).

The Attorney General's 1896 opinion provoked controversy in Congress, because some Congressmen believed that railroads and other private carriers should not be permitted to carry unstamped letters even of their own officers and agents. Congress ultimately decided, however, "to adopt formally the interpretation given by" the Attorney General in 1896. See 28 Op. Att'y Gen. 537, 540 (1910). The exception for letters that "relate * * * to the current business of the carrier" was therefore enacted. Act of May 4, 1909, ch. 321, § 184, 35 Stat. 1124. The legislative history makes it clear that Congress intended the scope of this exception to correspond to

the interpretation advanced by the Attorney General 13 years earlier.⁴

In 1910 the question arose whether, under the statute as amended in 1909, a railroad could carry letters from agents of a railroad association, of which it was a member, to other members of the same association. The Attorney General determined that such carriage would violate the Private Express Statutes. 28 Op. Att'y Gen. 537 (1910). He explained (*id.* at 541):

[T]he purpose of Congress in introducing this clause [authorizing carriage of letters relating to the business of the carrier] was to permit a carrier to transport free outside the mails its own messages within the terms of the opinion of Attorney-General Harmon, and it was not the intention of Congress to revolutionize the then existing law and practice by permitting free transportation of letters and packets belonging to railroads or persons other than the carrier even though such letters or packets might "relate to the current business of the carrier."

The Attorney General acknowledged that the language of the 1909 amendment might support a contrary result, but added that "considerations of syn-

⁴ The proponent of the 1909 amendment stated: "I would be perfectly content if [Rev. Stat. § 3985] was so recast that it would in fact express what the opinion of the Attorney-General said he thought it did express; in other words, I simply wish that the section shall be put in the shape that the Attorney-General construes it now to be in." 42 Cong. Rec. 1975 (1908) (statement of Sen. Bacon). The House Report stated that the amendment put the statute "in exact conformity with the construction placed upon existing law," citing the Attorney General's 1896 opinion. 43 Cong. Rec. 3790 (1909).

tax and grammar must yield to the intention of Congress" (*id.* at 542).

In 1912, the Attorney General again addressed the letters-of-the-carrier exception in a case similar to the instant case. The Postmaster General had inquired whether the Erie Railroad Company could deliver letters addressed to its workers from the Erie Employees Relief Association, an independent organization composed of railroad employees that managed the railroad's pension fund. See 29 Op. Att'y Gen. 418 (1912) (*reprinted at* J.S. App. A116-A118). Addressing the exception now contained in Section 1694, the Attorney General concluded that "Congress has imposed two conditions upon the free transportation of letters outside the mail: First, that the letters should be the letters of the carrier itself; and second, that they should relate to its own current business. The concurrence of both these conditions is essential to the privilege" (J.S. App. A116-A117).

Turning to the facts of the case, the Attorney General opined that the 1909 amendment would permit the Erie Railroad to deliver letters of the Association "in so far as the letters are addressed to the railroad company (or its officers or employees as representing it)" (J.S. App. A118). The Attorney General concluded, however, that the exception did not extend to routine correspondence from the Association to railroad employees: "[I]t is not material that the purpose of the Association and the subject of its communications is a pension system for the carrier's employees, and so a matter of interest to it, for the law excepts only the communications of the carrier itself" (*id.* at A117).

Following these long-standing and contemporaneous interpretations of the statute by the Attorney

General, the Postal Service has promulgated regulations defining the scope of the letters-of-the-carrier exception. The regulations provide (39 C.F.R. 310.3 (b)):

The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the individual actually carrying the letters is not the person sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person (see § 310.3(b)(2)) and the letters must relate to the current business of such person.

As construed by the Postal Service, the exception thus imposes the dual requirement that the letters be letters "of the carrier" and that those letters relate "to the current business of the carrier." In a series of advisory opinions rendered in 1976, the Postal Service accordingly ruled that letters from labor unions to school district employees, carried by a school district in its internal mail system, do not qualify as "letters of the carrier." See J.S. App. A73-A74.

b. In the instant case, as in the 1912 case analyzed by the Attorney General and the more recent school district cases, the letters-of-the-carrier exception does not apply. As the Postal Service explained in its advisory opinion (J.S. App. A73), letters from the Union to the University's custodial employees are not "letters of the carrier" because they are not "sent by or addressed to members of the staff or faculty in their official capacity as representatives of the employer University." It cannot plausibly be contended that workers receiving routine Union correspondence are acting as "official representatives" of

the University. To the contrary, it would be more accurate to describe such workers as acting, like the Union itself, in an arm's-length (if not an adversarial) relationship with the University. As the University observes in its jurisdictional statement (at 15), it could be subjected to an unfair labor practice charge under California Government Code Section 3571(d) if it attempted to learn the contents of the union letters at issue here. We agree that "a letter the contents of which are protected from disclosure to the University" cannot be deemed to be a letter "to the University" (J.S. 15).

Moreover, the letters here do not relate to "the current business of the carrier" (18 U.S.C. 1694) as that term has been construed by the Attorney General and the Postal Service. Although any letter on union business would likely be of some interest to the employer, the Postal Service has reasonably construed the statutory exception to require that letters be sent to employees in their official capacity as representatives of the employer (J.S. App. A73). That construction is strongly supported by the statute's legislative history. It also sets forth a fair reading of the statutory language, since letters relating to the "business of the carrier" would normally be sent to employees in an agency capacity rather than in some other capacity. In concluding that the term "business of the carrier" should be read broadly to include anything having to do with labor relations, the court of appeal erred in consulting state law to determine the meaning of the federal statute. The court instead should have deferred to the long-standing interpretation of the statute put forth by the Postal Service. See *Young v. Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op.

6; *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984); *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982); *Udall v. Tallman*, 380 U.S. 1, 5 (1965).

A narrow interpretation of the term "business of the carrier" is obviously necessary lest compliance with the Private Express Statutes become optional on the part of the states. If states can define "harmonious labor relations" as the business of a state university, there is no clear limit on a state's ability to authorize its instrumentalities to deliver unstamped mail over federal postal routes. Even delivery of indisputably personal letters might be justified under that approach, since the state by performing such a service to its employees would surely foster good relations with them. Such an expansive construction of the letters-of-the-carrier exception would result in widespread encroachment on the postal monopoly and a significant depletion of Postal Service revenues, in defiance of Congress's clearly expressed intent.⁵

c. Although the court of appeal did not address the alternative grounds that the Board advanced for

⁵ Contrary to the court of appeal's statement (J.S. App. A9-A11), this Court's decisions in *United States v. Erie R.R.*, 235 U.S. 513 (1915), and *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), do not support its conclusion that the business of the University includes the business of the Union for purposes of 18 U.S.C. 1694. The mail at issue in *Erie R.R.* involved a joint enterprise operated by a railroad and a telegraph company, and the Court held that the "business" of the railroad included the business of the joint enterprise (see 235 U.S. at 516-517). That case sheds no light on how the term "business of the carrier" should be construed where, as here, two organizations are in an arm's-length or adversarial relationship. In *Perry Education Ass'n*, the Court expressly declined to reach the question presented here (460 U.S. at 39 n.1).

its decision, those rationales are also without merit. Congress has set forth in 18 U.S.C. 1696(c) another exception to the bar against private carriage of mail, providing that the Private Express Statutes do not prohibit "the conveyance or transmission of letters or packets by private hands without compensation." Postal Service regulations have long defined "compensation" to include nonmonetary compensation, stating that, "when a business relationship exists or is sought between the carrier and its user, carriage by the carrier of the user's letter will ordinarily not fall under this exception" (39 C.F.R. 310.3(c)).

Consistently with these regulations and its prior opinions, the Postal Service's advisory opinion here reasonably explained that an employer's carriage of letters from a union to its employees normally is not undertaken "without compensation." J.S. App. A69-A72. Given the arm's-length relationship between the parties, the employer in such circumstances will typically expect "actual or hoped-for benefits" in exchange, whether in the form of "increased good will on the part of employees or of their representatives, in the forbearance [*sic*] of demands for other benefits, or in the facilitation of a continuing relationship" (*id.* at A71). The Postal Service further observed that the "private hands without compensation" exception was "intended to permit the gratuitous carriage of letters that may be voluntarily undertaken out of friendship," whereas "the carriage contemplated here is in no sense a gratuitous act" (*id.* at A72).⁶

⁶ The Postal Service's narrow construction of the "private hands without compensation" exception is of long standing. In his 1896 opinion, the Attorney General concluded that "the express or implied obligation of railroads to carry letters for

The Board's reliance on a Postal Service regulation suspending application of the Private Express Statutes for "bona fide student and faculty organizations" was equally misplaced. The exception covers "core" university organizations (J.S. App. A74) that would be covered by the letters-of-the-carrier exception but for the fact that the organization in question happens to be legally distinct from the university. As the Postal Service concluded in its advisory opinion (*id.* at A74-A75), a labor union seeking to represent a University's custodial employees "is neither a student nor a faculty organization," and that conclusion, contrary to the Board's belief (*id.* at A42), poses no problem under the Equal Protection Clause.

3. The question presented here is of great importance to the United States Postal Service. Postal Service operating revenues are substantial, amounting in 1986 to approximately \$30 billion. Of this amount, some \$27 billion was derived from classes of mail, consisting primarily of letters, that are protected by the Private Express Statutes. Annual Report of the Postmaster General for 1986, at 26-28. It is in the nature of the Postal Service's business that its revenues are derived from millions of individual transactions that occur in the course of a year. The application of the Private Express Statutes to particular *types* of transactions is therefore

each other to remotely connecting lines would amount to 'compensation' within the meaning of the statute" (21 Op. Att'y Gen. at 401). The Attorney General also doubted whether delivery by an employee of a railroad could ever properly be termed delivery by "private hands" (*ibid.*). It would be even more strained to conclude that delivery of mail by an employee of a state is delivery by private hands.

very important, because the cumulative effect nationwide of an erroneous application of the statutes to recurring transactions can severely deplete postal revenues. See *Greenburgh Civic Ass'n*, 453 U.S. at 135 (Brennan, J., concurring).

As the University observes (J.S. 21), the record here shows that one union at one campus spent two to three thousand dollars a year on postage for correspondence sent to one group of University employees. There are many unions, many campuses, and many thousands of employees in the University of California. Moreover, although the question presented here has thus far arisen fairly infrequently outside California, the court of appeal's rationale extends far beyond the University of California system and can be invoked by other schools and other public institutions nationwide. Unless that court's decision is reversed, therefore, the predictable consequence will be a significant reduction in postal revenues, resulting in an increased cost to the public or a less efficient postal system, either of which is at odds with the purpose of the Private Express Statutes.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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MAY 1987

APPELLANT'S BRIEF

AUG 28 1987

No. 86-935

JAMES E. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Appellee,
and

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 371, and WILLIAM H. WILSON,
PRESIDENT, LOCAL 371,
Appellees.

On Appeal from the Court of Appeal
of the State of California,
First Appellate District

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QUESTION PRESENTED

Whether the federal Private Express Statutes and implementing regulations prohibit the University from carrying in its internal mail system unstamped letters from a labor union to University employees.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-935

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Appellant,

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PUBLIC EMPLOYMENT RELATIONS BOARD,
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AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 371, and WILLIAM H. WILSON,
PRESIDENT, LOCAL 371,
Appellees.

On Appeal from the Court of Appeal
of the State of California,
First Appellate District

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the California Court of Appeal, First Appellate District, is reported at 182 Cal. App. 3d 71, 227 Cal. Rptr. 57 (1986), and is reprinted in the Appendix to the Jurisdictional Statement at J.S. App. A-1. The earlier opinion of the same court in this case is reported at 139 Cal. App. 3d 1037, 189 Cal. Rptr. 298

(1983), and is reprinted at J.S. App. A-58. Administrative decisions below by the Public Employment Relations Board (PERB) are not officially reported but appear in the Public Employee Reporter, California Edition (PERC) (Labor Relations Press). The final PERB decision in this case appears at 8 PERC ¶ 15196 and is reprinted at J.S. App. A-14. PERB's decision remanding the case for further factual findings appears at 7 PERC ¶ 14103 and is reprinted at J.S. App. A-56. The Administrative Law Judge's findings were not reported and are reproduced at J.S. App. A-48. The first decision by PERB as well as the Hearing Officer's proposed decision appear at 6 PERC ¶ 13003 and are reprinted at J.S. App. A-76 and A-81.

JURISDICTION

The Supreme Court of California denied appellant's timely Petition for Hearing on September 10, 1986. J.S. App. A-13. The cause was returned to the California Court of Appeal by Remittitur on September 11, 1986, J.S. App. A-12, and the Court of Appeal's judgment became final on that date. The University filed a timely notice of appeal on November 12, 1986. J.S. App. A-95. This appeal was docketed on December 5, 1986, and probable jurisdiction was noted on June 22, 1987.

The jurisdiction of this Court is conferred by 28 U.S.C. § 1257(2), because the judgment rendered by the highest state court in which a decision could be had sustained the validity of a state statute against a challenge that the statute as construed conflicts with the laws of the United States.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Private Express Statutes, 18 U.S.C. §§ 1694, 1696(c); the Postal Service Regulations, 39 C.F.R. §§ 310.3(b)(1), 310.3(c), 320.4; and the Higher Education Employer-Employee Relations Act (HEERA), Cal. Gov't Code 3568, are set forth in the

appendix hereto. Other relevant United States Postal Service statutes and regulations, as well as other relevant sections of HEERA, are set forth at J.S. App. A-100 through A-115.

STATEMENT OF THE CASE

This case arose out of an unfair practice charge filed in 1979 by appellees William H. Wilson and Local 371 of the American Federation of State, County and Municipal Employees (the Union) against appellant, The Regents of the University of California (the University), before the California Public Employment Relations Board (PERB), also appellee here. The charge was based upon the assertion that the University's refusal to permit the Union to send unstamped letters to custodial employees at the University's Berkeley campus through the University's internal mail system violated the Union's right of access to employers' "means of communication" guaranteed by the California Higher Education Employer-Employee Relations Act (HEERA).¹ Cal. Gov't Code

¹ It was stipulated that if access were permitted, the Union would use the University mail system to send the following types of materials:

1. general notices of union activities, including meetings, meet and confer sessions, and other concerted activities;
2. union publications, including newsletters, having to do with union-related activities;
3. materials concerning the Union's position on the benefits of collective bargaining and the rights of employees protected under collective bargaining laws, including union-related election materials, information, and advice;
4. general notices of changes or modifications in University rules, regulations, and benefits affecting members of the Union; and
5. other materials generally concerned with the business of the Union and the members thereof.

R. 276-277. The stipulation further provided that "[t]hese materials would be sent addressed to the individual employee at a particular location." *Id.* at 277.

§§ 3560-3599. The University's refusal was based on the belief that delivering the unstamped letters would violate the postal laws, which prohibit private carriage of mail across United States postal routes unless the carriage qualifies for an exception to the Private Express Statutes. See 18 U.S.C. § 1694. The exception under which the University system operates is known as the "letters-of-the-carrier exception," which, according to both the University and the United States Postal Service, forbids carriage of mail for third parties. See 18 U.S.C. § 1694; 39 C.F.R. § 310.3(b).

The record describes in some detail the operation of the internal mail-delivery system at the Berkeley campus. Outgoing mail originating at the campus is collected from many campus mail depositories by University employees, and is then taken by those employees to a central sorting operation. There the mail is separated into three groups: (1) mail already bearing United States postage; (2) unstamped internal University mail for Northern California; and (3) other unstamped mail. The prestamped mail is delivered immediately to the United States Postal Service without further handling by the University. Internal University mail is monitored to ensure that only official University business is involved. Unstamped mail that comes within an exception to the Private Express Statutes and is addressed to University destinations in Northern California is then sorted and delivered by University employees. Other unstamped mail is rated and affixed with United States postage and delivered to the Postal Service. Senders of this third group of mail are charged by the University mail operation for postage affixed. J.S. App. A-3.

Mail coming into the University from the Postal Service is handled in one of two ways: U.S. mail addressed to any one of some fifty sites on the Berkeley campus is delivered to the site by the Postal Service. The remainder of the mail is delivered to the central sorting

facility and then delivered to its ultimate University destination by University employees. *Id.*

In summary, the only mail accepted for delivery within the University's internal mail system is either mail bearing United States postage or official University mail exempted from the Private Express Statutes. The University long ago adopted regulations denying use of its internal mail system to non-University organizations or for political, commercial, or social purposes. Under these regulations, unions are prohibited from using the University's internal mail system. It is that prohibition that gave rise to the Union's unfair practice charge.

A hearing was conducted by PERB in 1980. The University tried to show that it was prohibited by the Private Express Statutes from delivering the unstamped union letters. The Hearing Officer held that the Private Express Statutes could not be considered by PERB in the course of resolving an unfair practice charge brought under HEERA. J.S. App. A-90. Having ruled federal law out of the case, the Hearing Officer concluded in 1980 that the University's refusal to deliver the unstamped union mail violated HEERA. J.S. App. A-91. Pursuant to HEERA and the regulations of PERB implementing HEERA, the University took exception to the Hearing Officer's decision. PERB ruled on the University's exceptions in Decision No. 183-H, J.S. App. A-76, on November 25, 1981, and ordered the University to grant the Union access to the internal mail system without payment of postage. PERB declined to consider whether its order violated federal law.

The University then petitioned the California Court of Appeal for a Writ of Review. While that appeal was pending, the United States Postal Service issued an opinion in response to a request for advice from the University advising the University that the carriage ordered by PERB would violate the Private Express Statutes. PES

No. 82-9, J.S. App. A-66. On February 17, 1983, the California Court of Appeal remanded the case to PERB for findings on the issue whether the University's regulations were reasonable in light of all the surrounding circumstances. J.S. App. A-58. Further, it held that among the circumstances that PERB might feel free to "consult" were the Private Express Statutes and implementing regulations. J.S. App. A-64.

On October 18, 1984, PERB issued Decision No. 420-H, J.S. App. A-14, again holding that the University must deliver unstamped union letters through its internal mail system. PERB acknowledged that the materials at issue are "letters" within the meaning of the postal statutes, J.S. App. A-25-26, and that the University mail system crosses postal routes, *id.* at A-27. However, the opinion of the Postal Service notwithstanding, PERB found that carriage of the letters was exempted from the prohibitions of the Private Express Statutes by an exception for "letters of the carrier," 18 U.S.C. § 1694, 39 C.F.R. § 310.3(b), and by a second exception for letters delivered by "private hands without compensation," 18 U.S.C. § 1696(c), 39 C.F.R. § 310.3(c), and by a suspension for letters of "bona fide student and faculty organizations," 39 C.F.R. § 320.4.

The University again appealed. A brief was filed by the United States Postal Service as *amicus curiae*, urging reversal of PERB's order. On June 9, 1986, the Court of Appeal issued its second decision in the case, this time affirming PERB's order. The Court of Appeal found that delivery of unstamped union mail through the University's internal mail system did not violate the Private Express Statutes because it fell within the letters-of-the-carrier exception. J.S. App. A-6. The Court of Appeal therefore did not rule on PERB's conclusions concerning the exception for carriage by private hands without compensation and the suspension for letters of faculty and student organizations.

The University petitioned the California Supreme Court for a Writ of Review. That petition was denied on September 10, 1986. J.S. App. A-13.

On September 25, 1986, Louis A. Cox, General Counsel of the United States Postal Service, wrote to the University advising that the decision of the California Court of Appeal is detrimental to "significant federal interests" and "misinterprets Federal law which it is the responsibility of the United States Postal Service to enforce." J.S. App. A-96. The letter went on to caution the University that the Advisory Opinion issued by the Postal Service (PES No. 82-9) was still in effect and that the University "may not lawfully carry the letters of organizations of the University's employees to those employees under the circumstances involved in this litigation, without the payment of postage on those letters as though they were carried by the Postal Service." J.S. App. A-97. The letter concluded that should the University attempt such carriage, the University and the senders of the letters would be subject to the penalties provided by federal law for violations and would also be subject to liability for the postage that would have been paid had those letters been sent through the United States mail. *Id.*

SUMMARY OF ARGUMENT

The federal Private Express Statutes generally prohibit the carriage of mail by any entity other than the United States Postal Service. However, Congress has made certain statutory exceptions, and the Postal Service is authorized to issue regulations "suspending" the operation of the statutes when it deems suspension to be in the public interest. Neither the exceptions nor the suspensions, however, authorize carriage by the University of union letters.

1. *Letters of the Carrier.* The statute generally prohibiting private carriage of mail also creates the letters-of-the-carrier exception, which excepts from the statute's

prohibition letters that "relate . . . to the current business of the carrier." 18 U.S.C. § 1694. Pursuant to that statute, the Postal Service has promulgated a regulation establishing two criteria for carriage under the exception: (1) "the individual actually carrying the letters . . . must be an officer or employee of [the person sending the letters or to whom the letters are addressed]"; and (2) the letters "must relate to the current business of [the person sending the letters or to whom the letters are addressed]." 39 C.F.R. § 310.3(b)(1). Thus, if the letter is carried by a University mail carrier, it must be either sent by or addressed to the University, directly or through one of its agents. Letters sent from the Union to University custodial employees are not sent to the employees as agents for the University and are therefore not addressed to the University within the meaning of the regulation. Consequently, they do not fall within the plain meaning of the regulation.

The regulation does not impermissibly narrow the scope of the statutory exception. Although the statute does not expressly include an agency requirement—instead simply referring to letters that "relate . . . to the current business of the carrier," 18 U.S.C. § 1694—the legislative history makes it clear that Congress intended such a requirement. In amending the statute in 1909, Congress intended to adopt the reasoning of an 1896 Attorney General's opinion, which had specifically rejected the argument advanced by PERB in this case that letters relating to the business of the carrier could be carried even if they were not "sent by or addressed to the carrying company, or on its behalf." 21 Op. Att'y Gen. 394, 400 (1896).

2. *Private Hands Without Compensation.* Letters carried "by private hands without compensation" are also excepted from coverage of the Private Express Statutes. 18 U.S.C. § 1696. This is a narrow exception that was "intended to permit the gratuitous carriage of letters

that may be voluntarily undertaken out of friendship." PES No. 82-9, J.S. App. A-72. Carriage of mail by a statewide governmental agency under compulsion of state law and funded by the state government is not the kind of carriage that the exception was intended to permit.

If the phrase "private hands" means anything, it must mean that a public institution employing approximately 100,000 people is not entitled to the benefits of the exception. If the University falls within the meaning of that phrase, then so must all entities other than the Postal Service. The distinction apparently drawn by the statute is between "private" carriage, meaning carriage by private individuals acting in a personal sphere, and "public" carriage, meaning carriage arising out of business, commercial, and governmental relationships. See 21 Op. Att'y Gen. 394, 401 (1896) (neither railroads nor their employees, "while engaged in their business, can be considered as 'private hands'" within the meaning of the statute).

The carriage at issue here is also not "without compensation." Postal Service regulations provide that "compensation" consists of monetary payment, in addition to "non-monetary valuable consideration and . . . good will." 39 C.F.R. § 310.3(c). Here, the state, which ordered the carriage, also pays for it in the form of legislative appropriations, which is the same situation that would obtain if a state postal service were established to carry the mail of residents of the state at no charge. Moreover, the imposition of sanctions for not carrying letters is functionally similar to payment for carrying the letters.

3. *The Suspension for Bona Fide Student and Faculty Organizations.* Pursuant to authority delegated by Congress, 39 U.S.C. § 601(b), the Postal Service has suspended the operation of the Private Express Statutes so as to permit "colleges and universities to carry in their internal mail systems the letters of their *bona fide* stu-

dent or faculty organizations to campus destinations." 39 C.F.R. § 320.4. PERB's ruling that letters from the Union to the University's custodial employees could be carried under the suspension was based upon its view that the suspension applied to letters of faculty unions and its highly suspect conclusion that a distinction between faculty unions and non-faculty unions would violate the Equal Protection Clause. Since PERB issued its decision, however, the Postal Service has made it clear that faculty unions do not constitute "bona fide faculty organizations" within the meaning of the regulation. PES No. 86-1. As a result, the regulation does not set up the classification condemned by PERB, and the suspension cannot be extended to the letters at issue in this case.

ARGUMENT

I. THE LETTERS-OF-THE-CARRIER EXCEPTION DOES NOT PERMIT CARRIAGE OF LETTERS FROM THE UNION TO UNIVERSITY CUSTODIAL EMPLOYEES

The longstanding and unvarying opinion of the United States Government has been, and continues to be, that private carriage of mail under circumstances such as those present here unduly impinges on the federal postal monopoly. Federal postal regulations, statutes, case law, and opinions of the Attorney General dating back well into the last century speak with one voice, and that voice denies access by the Union to the University's internal mail system.²

Congress's power to create the federal postal monopoly is found in Article I, section 8, clause 7, of the Constitution, which grants Congress the power "to establish post

² This Court has never spoken directly on this issue. Although the Solicitor General argued in *Perry Ed. Ass'n v. Perry Local Ed. Ass'n*, 460 U.S. 37, 39 n.1 (1983), that carriage of union letters in a school's internal mail system violated the Private Express Statutes, the Court expressly declined to reach that issue.

offices and post roads." The monopoly is implemented by the Private Express Statutes, which, with some exceptions, prohibit the private carriage of mail. These statutes "have existed in one form or another since passed by the First Congress in 1792, and their constitutionality has never been successfully challenged."³ *Brennan v. United States Postal Service*, 439 U.S. 1345, 1347 (1978) (op. of Marshall, J., in chambers) (footnote omitted). The purpose of the Private Express Statutes is to protect the revenues of the Postal Service. *United States v. Bromley*, 12 How. (53 U.S.) 88, 97 (1851). As a federal court observed with respect to a predecessor of the current statutes almost a century and a half ago:

That the intention of the legislature in passing the act of 1825, was to prevent competition with the government on any of the mail routes, cannot be denied; some of the routes are profitable, and produce a revenue to the post-office department; but others are a burden, and exhaust this profit in their support. If the most profitable routes are to be occupied by private individuals or companies, the consequence must be, that the remote routes, although of equal importance to those interested in them, must be abandoned, or supported from the treasury of the United States; which is well known to be contrary to the general policy of the government.

United States v. Hall, 26 F. Cas. 75, 78 (No. 15,281) (C.C.E.D. Pa. 1844).

³ In fact, "the 1792 Act continued in effect a statute of the Continental Congress that had created a postal monopoly. Act of Feb. 20, 1792, 1 Stat. 232, 236, adopting Act of Oct. 18, 1782, 23 J. Cont. Cong. 672-73." *Brennan v. United States Postal Service*, 439 U.S. 1345, 1347 n.2 (1978) (op. of Marshall, J., in chambers). Moreover, in both Britain and the Colonies, postal service had been a monopoly of the government for the prior 150 years. *United States Postal Service v. Brennan*, 574 F.2d 712, 713 n.5 (2d Cir. 1978). See also *United States v. Kochersperger*, 26 F. Cas. 803, 803 (No. 15,541) (C.C.E.D. Pa. 1860) ("No government has ever organized a system of posts without securing to itself, to some extent, a monopoly of the carriage of letters and mailable packets.").

Nonetheless, Congress has made certain exceptions to the Private Express Statutes, one of which is known as the "letters-of-the-carrier exception." The statute establishing this exception provides:

Whoever . . . carries, otherwise than in the mail, any letters or packets, *except such as relate . . . to the current business of the carrier*, . . . shall, except as otherwise provided by law, be fined not more than \$50.

18 U.S.C. § 1694 (emphasis added). Under this exception, an individual may carry his own letters across postal routes without running afoul of the Private Express Statutes. When the carrier is an institution rather than an individual, the principle is the same but the analysis is slightly more complex. Pursuant to its power under 39 U.S.C. § 401(2), the Postal Service has promulgated the following regulation:

The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the *individual* actually carrying the letters is not the *person* sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of *such person* (see § 310.3(b)(2)) and the letters must relate to the current business of such person.

39 C.F.R. § 310.3(b)(1) (emphasis added).

We show below that the statute, illuminated by its legislative history, as well as the regulation implementing it, prohibit the University from carrying the Union's unstamped letters.

A. The Plain Language of the Regulation Prohibits the University from Carrying Union Letters Because the Letters Are Not Addressed to the University

Analysis of the language of the regulation reveals that the letters-of-the-carrier exception is not broad enough to cover letters of the Union. When, as here, the individual is not carrying his own letters, the regulation focuses on

the person employing the individual who carries the letters: it requires that the letters be either addressed to or sent by that "person."⁴ In this case, the person employing the individual who carries the letters is the University.⁵ Accordingly, for letters properly to be carried in the University mail system, the University must be either the addressee or the sender of the letters. Where letters are sent from the Union to the University's custodial workers, neither condition is met.⁶

The court below paraphrased the language of the regulation as requiring that for the letters-of-the-carrier exception to apply, "the letter must be addressed to or sent from an individual *in his or her capacity as an employee of the institution*," and then held that the letters in question were sent to the custodial employees in their "capacity" as employees. J.S. App. A-8. To understand the significance of the employee's "capacity," it is helpful to distinguish between an employee's "official" or "representative" capacity to act *on behalf of* the University, on the one hand and, on the other hand, the employee's "capacity as an employee" which, in the usage of

⁴ "Person" is defined by the regulations to include, *inter alia*, corporations and government agencies. 39 C.F.R. § 310.1(c).

⁵ The regulation emphasizes the importance of the employment relationship between the "person" sending or receiving the letters and the individual who carries them. The second paragraph of the regulation provides in part:

The fact that the individual actually carrying the letters may be an officer or employee of the person sending the letters or to whom the letters are addressed for certain purposes does not necessarily mean that he is an officer or employee for purposes of this exception.

39 C.F.R. § 310.3(b)(2). The regulation then goes on to require that the individual carrying the letters be "a regular salaried employee."

⁶ The argument that letters from the Union are letters *from* the University has not been advanced, nor could such an argument fairly be made. Therefore, the only issue is whether the letters are *addressed to* the University.

the Court of Appeal, seems to indicate only that the employee receives the communications because he is a University employee. But the employee who receives letters *because* he is a University employee may nevertheless receive them *on his own behalf*, to act on as he sees fit, not as he thinks the University would wish him, as its agent, to act. Those letters are not sent to the employee as an agent or representative of the University. Accordingly, they are not sent to the University.

If the letters are not sent to the University, then to satisfy the exception the individual who carries them must be an employee, not of the University, but of the union that sends them or of the individual who receives them. But the individual who carries the letters is neither: he is an employee of the University. Accordingly, when the employee receives the letters in his personal capacity as a University employee rather than in his representative capacity as an agent of the University, the letters are not *to* the University—*i.e.*, they are not sent to the employer of the carrier of the letters—and the requirement of the exception is not met.⁷ On the other

⁷ Prior to 1979, section 310.3(b)(1) applied by its terms to letters "sent by or addressed to an officer or employee of a carrier on the current business of the carrier (*i.e.*, in his capacity as an officer or employee)." That language was modified for purposes of clarification (see 43 F.R. 60616, 60618) to read as it does today. However, there is no room for argument that the regulation meant that letters to employees *qua* employees were at that time subject to the letters-of-the-carrier exception. First, the current language, which was not intended to create a substantive change, precludes such a possibility. Second, such an interpretation would be inconsistent with the legislative history of the statute and administrative interpretation of the statute and regulation, as discussed below. Third, the language quoted above is more fairly read as meaning that the letters must be sent by or addressed to the employee in his capacity as a *representative* of the University, since otherwise the language in parentheses would add nothing to the regulation. In any event, the regulation was amended before the instant dispute arose.

hand, if the letters are sent to an employee in his *official* capacity, then the letters are, in fact, letters *to* the University. That is, they are sent to the University through its agent. As a result, such letters properly qualify for the letters-of-the-carrier exception.

The difference between the Court of Appeal's formulation and the correct formulation is significant, because the former lacks any requirement of agency. Naturally, an entity such as a corporation or government agency can act only through individuals. Thus, certain acts of individuals may, in the proper circumstances, be said to be acts of the entity. In the University's Jurisdictional Statement it presented a contrast between two communications sent to the Director of Admissions of the University. The first—an application for admission to the University—is, under anyone's view, a letter to the University through the person duly authorized by the University to receive such letters. The second—a letter to the same person from an insurance company offering him a special rate on life insurance because he is an employee of the University—is equally clearly not a letter to the University. It does not attempt to induce the recipient to direct University business to the company, but instead attempts to induce him to direct his own business to the company. The University may control his discretion in the former decision, but over the latter decision it has no control.

Interestingly, the University and PERB agree that the first letter falls within the letters-of-the-carrier exception but that the second does not. *See* Motion to Dismiss at 17 n.12. Where PERB and the University part company is over the question whether the insurance solicitation is governed by the same principle as the letters from the Union to the custodial staff. PERB indicates that it is not, because the Director of Admissions receives the insurance company letter "as an individual." *Id.* Yet, this letter is sent to him only because he is an employee

of the University; it may even contain a clause that if his employment with the University has terminated, the offer is void. Moreover, the letter deals with a subject matter over which the employee has unfettered control, just as in the custodial employee's decision whether to support the Union. These situations seem indistinguishable, yet PERB purports to distinguish them. How can one argue that the Director receives the letter from the insurance company in his "capacity as an individual," while the custodial employee receives the letter from the Union in his "capacity as an employee"? The answer seems to be that the argument can be made only because the distinction has no content.⁸

Even if the distinction identified by PERB could be maintained, that would not cure the main infirmity in PERB's analysis, which is that it is at war with the text of the regulation. The text of the regulation requires that "the individual actually carrying the letters . . . must be an officer or employee of" the addressee. In the absence of an agency relationship between the individual addressee and the employer of the individual carrying the letters, that requirement is not met.

As the preceding discussion should make clear, the requirements of the regulation are satisfied only if: (1) the University mail carriers are employees of the custodial workers to whom the letters are addressed, or (2) the custodial workers receive the letters on behalf of the University. But the University's mail carriers are not employees of the University's custodial workers, and the custodial employees do not receive the letters on behalf of the University. Rather, in receiving the letters, the em-

⁸ PERB also suggests that the insurance letter does not relate to the current business of the University. Motion to Dismiss at 17 n.12. However, it would be no greater leap to conclude that the financial security of its employees constitutes the "current business" of the University than it was to conclude that "harmonious labor relations" constitute such business.

ployees stand, with the Union, in an arm's-length (some would say adversarial) relationship with the University. If any further demonstration were needed that these letters are not letters to the University, one need only consider that if the University attempted to learn the contents of the letters, it could well be subject to an unfair practice charge. Cal. Gov't Code § 3571(a), (d).

The distinction between "employees" of the entity and "agents" of the entity for purposes of the Private Express Statutes was recognized 75 years ago in an opinion of the United States Attorney General. 29 Op. Att'y Gen. 418 (1912), J.S. App. A-116. The question before the Attorney General was whether the Erie Railroad Company could carry, as "letters of the carrier," two categories of letters, both sent by the secretary of the Erie Employees' Relief Association, an organization concerned with the welfare of the railroad's employees. The first category comprised letters to employees of the railroad concerning a pension system for those employees. The second category comprised letters to the railroad concerning relations between the railroad and the association. The Attorney General reasoned:

The constitution and by-laws of the Erie Employees' Relief Association show that the association is not a department of the railroad company, but a separate and independent organization, governed by directors of its own, having its own secretary, chosen by its directors, having its own funds and property wholly separate from those of the railroad, and having obligations and liabilities not attached upon the railroad. This being so, *it is not material that the purpose of the association and the subject of its communications is a pension system for the carrier's employees, and so a matter of interest to it, for the law excepts only the communications of the carrier itself*

A different situation is presented by such of the letters referred to in your question as are addressed by the association to the railroad company (*or its officers and employees as representing the railroad company*) concerning relations between the railroad company and the association. These communications fall within both of the conditions imposed by Congress, because being addressed to the carrier itself, they are communications within the intention of the statute, as shown by the opinions cited, and being on the subject of the carrier's own relation to the relief association, they relate to the carrier's current business.

J.S. App. A-117 (emphasis added).

The reasoning of the Attorney General parallels the plain meaning of the later-enacted regulation, which in turn parallels the position urged in this Court by both the University and the United States Postal Service.⁹ Applied

⁹ In its Motion to Dismiss, PERB placed substantial reliance on this Court's decision in *United States v. Erie Railroad*, 235 U.S. 513 (1915), to support its contention that the statute imposes no agency requirement. Motion to Dismiss 12-13, 20-21. No such ruling can be gleaned from the Court's decision in that case, however, since an agency relationship was present. The railroad and Western Union jointly operated telegraph lines with joint employees over the railroad's right of way, and they shared in the receipts of the telegraph operations. The letters at issue were sent by the joint superintendent of the telegraph business to a person who was both the station agent of the railroad and the manager of the telegraph, and they dealt with the telegraph business and the railroad's financial stake therein. The Court held that these letters could properly be carried by the railroad, because they were designed to promote the operation of the joint venture. 235 U.S. at 520.

The Court's conclusion in *Erie Railroad* is wholly consistent with the interpretation of the letters-of-the-carrier exception advocated by the University. The letters were carried by railroad employees and sent to the station agent of the railroad, and they concerned business in which the railroad plainly had an interest. In any event, the joint-venture exception to the Private Express Statutes is now

to the facts of this case, the Attorney General's reasoning compels the conclusion that letters from the Union to the University's custodial employees are not covered by the letters-of-the-carrier exception.

B. The Regulation Embodying the Letters-of-the-Carrier Exception Fairly Reflects the Intent of Congress

Notwithstanding the consistency of interpretation of the letters-of-the-carrier exception over the past century, PERB in its Motion to Dismiss suggests that if the regulation contains an agency requirement—which, as shown above, it plainly does—then it constitutes an impermissible “narrowing” of the statute by the Postal Service, Motion to Dismiss at 16, and is “inconsistent with the system under which it was promulgated,” *id.* at 18. However, the legislative history of the statute demonstrates that the Postal Service regulation perfectly captures the intent of Congress.

The language of 18 U.S.C. § 1694 concerning the “current business of the carrier” was added to the statute in 1909. Act of Mar. 4, 1909, 35 Stat. 1123, 1124. Prior to that time, there was no such language in the statute, which provided exceptions only for letters that “relate to some part of the cargo of such steamboat or other vessel, or to some article carried at the same time by the same stage-coach, railway-car, or other vehicle.” Rev. Stat. § 3985, 18 Stat. 775. However, a Postal Regulation did contain an exception for letters that related “to the business of the railroad on which they are carried.” Postal Laws and Regulations of 1893 § 1022. In 1896, the Postmaster General, apparently concerned that the

codified in the regulations and requires that the joint enterprise operate with joint employees and that the parties share revenues and expenses. 39 C.F.R. § 310.3(b)(3). Such a description quite obviously does not describe the relationship between the University and the Union.

regulation might not be supported by the pre-1909 statute, sought an opinion from the Attorney General concerning its validity. 21 Op. Att'y Gen. 394 (1896). The Postmaster General favored the regulation about which he sought the Attorney General's opinion but was concerned that the railroads had construed the exception very broadly, so broadly that

a system of railway letter service has grown up of such proportions that it carries substantially all the correspondence of railway officers and employees, and those of kindred organizations, on all subjects connected with railroad business, and that regular offices for the distribution and routing of this railway mail are established at all large terminal points.

Id. at 397-98. The Attorney General agreed that, read literally, the statute would forbid carriage of any letters or packets outside the mails other than those covered by the express exceptions, but stated that "your predecessors who adopted and have maintained [section 1022], looking to the object which Congress manifestly had in view, construed [Rev. Stat. § 3985] as applying *only to carriage for other persons.*" *Id.* at 398 (emphasis added). He concluded that in enacting the general prohibition, Congress "had no thought of interfering with the private methods of carriers on post routes for communicating directly with their own employees or with other persons." *Id.* at 398-399. He stated: "The right is to carry letters *written and sent by the officers and agents of the railroad company which carries and delivers them*, about its business, and these only." ¹⁰ *Id.* at 399. The Attor-

¹⁰ Interestingly, there had formally been express recognition that a carrier could carry its own communications. The Act of April 30, 1810, 2 Stat. 592, 596, provided an exception for letters "as may be directed to the owner or owners of [the stage, vessel, etc.] and relating to the same." However, whether by inadvertence or design, that exception was not expressly continued in the Act of May 3, 1825, 4 Stat. 95, 107.

ney General then went on to state an interpretation of the regulation that substantially mirrors the current letters-of-the-carrier exception: "But any company, or any officer or employee thereof, *carrying letters which are neither written by that company nor addressed to it*, is liable to the penalties imposed by the law." *Id.* (emphasis added).

In the same opinion, on the question whether a railroad could carry letters from one of its connecting lines to another when the letters related to through business over the lines of all of the railroads, the Attorney General provided an answer directly relevant to PERB's claim here that because the subject of the union letters related to the "business of the University," i.e., "harmonious labor relations," they are properly carried in the University's mail system. The Attorney General responded:

This claim proceeds on the theory that the carrying company's interest, actual or possible, in the subject of the correspondence makes the letter "relate to its business," in the language of the postal regulations. But, as I have said, this language was used with reference to letters sent by or addressed to the carrying company, or on its behalf, and the form of expression adopted was doubtless merely intended to exclude private correspondence between persons in the employ of carriers. Otherwise the regulation, like the claim based on it, would be contrary to the law.

Id. at 400 (emphasis added). After noting that Congress intended that postal authorities would inspect letters carried outside the mails to determine whether violations of the law were taking place, the Attorney General stated that it was "difficult to attribute to Congress an intention to make the conduct of these officers depend on so difficult an inquiry as that involved in determining whether the carrier has an interest in the subject of the correspondence to which it is not a party." *Id.* at 400.

One might argue that the foregoing, while interesting, is merely ancient history, and the fact that the Postal Service and the Attorney General suffered in 1896 under the same misapprehension concerning the meaning of the Private Express Statutes as the University and the Postal Service suffer under today simply demonstrates that some mistakes have a long life. One might make such an argument, that is, had Congress not once again become involved in this story in 1909, when it added the statutory exception for letters relating "to the current business of the carrier," paralleling the pre-existing regulatory exception for letters relating to the "business of the railroad," which the Attorney General had interpreted in 1896. Act of Mar. 4, 1909, 35 Stat. 1123.

Fortunately, we are not left to guess at what Congress meant by the amendment, for the legislative history makes it clear that Congress intended to codify the interpretation of the statute's predecessor contained in the 1896 Attorney General opinion. On the Senate floor, the primary dispute was over the correctness of the 1896 Attorney General opinion. Senator Bacon of Georgia believed that the statute as it then read could not support the regulation interpreted by the Attorney General (section 1022 of the Postal Laws and Regulations), since the statute's "language is too plain to be possibly perverted to that extent and the perversion be justified." 42 Cong. Rec. 1902 (1908). He favored amending the statute to support the regulation. His view was that the Attorney General opinion was "simply a recognition of the fact that the present law is absolutely too narrow," and that "[i]f the law was enforced, half of [the railroad companies] would be in the penitentiary to-day, unjustly and improperly." *Id.* at 1903. However, he noted, "I do not wish a / amendment which would so enlarge it that the railroad companies would feel that they were at liberty to send upon their trains any letter which they might wish to send which related to their business." *Id.* at 1904.

Finally, he noted, "I simply want to make one final suggestion to the Senators in charge of the bill, and that is that this provision shall be made to express in exact language what the Attorney-General says it means; that is all." *Id.* at 1905. Ultimately, however, it was Senator Sutherland of Utah—who believed that the 1896 Attorney General's opinion reflected the "spirit" of the law, if not its letter—who moved the amendment in the Senate. He stated:

I move that amendment because I think that it puts in express language precisely what the section means as it stands without it. . . . I think the opinion of the Attorney-General . . . gives the correct construction to this section. The section is dealing with the carrying of mail for others. It is not dealing with the question of the carrying of the mail of the carrier itself.

...

I think it should be clear under the law that the carrier should not have the right to carry mail intended for others, *but only its own mail*. To that extent I think the law should permit the carrier to go.

42 Cong. Rec. 1976 (1908) (emphasis added).

The legislative history from the House side is in accord with the above. For example, the House Report stated:

[The amendment] is in exact conformity with the construction placed upon existing law. The regulations of the Post-Office Department permit such communications, and these regulations have been declared legal by an opinion of the Attorney-General of the United States.

The amendment therefore only makes clear the existing law upon the subject.

43 Cong. Rec. 3790 (1909). Thus, the evidence is unequivocal that the 1909 amendment was intended to em-

body the reasoning of the 1896 Attorney General opinion, which, as described above, took a narrow view of the phrase "business of the carrier" and clearly contains an agency requirement.

The history of the interpretation of the 1909 Act similarly supports the University's position. In assessing the intent of Congress in amending the statute, the Attorney General in a 1910 opinion described it as follows:

It thus appears that the purpose of Congress in introducing this clause was to permit a carrier to transport free outside the mails *its own messages* within the terms of the [1896] opinion of Attorney-General Harmon, and it was not the intention of Congress to revolutionize the then existing law and practice by permitting free transportation of letters and packets belonging to railroads or persons other than the carrier *even though such letters or packets might "relate to the current business of the carrier."*

28 Op. Att'y Gen. 537, 541 (1910) (emphasis added). The Attorney General continued:

In my opinion the history which I have above outlined puts it beyond question that Congress did not mean to do more than to permit carriers themselves to carry their own messages, and particularly corporate carriers to carry *their own* messages, which would necessarily be limited to their business, as Attorney-General Harmon pointed out.

Id. at 542 (emphasis in original).

Only two years later, in 1912, the Attorney General again had occasion to address the scope of the letters-of-the-carrier exception. In that opinion, the Attorney General cited the 1896 and 1910 opinions as standing for an interpretation of the exception that substantially parallels the current postal regulation alleged by PERB to be *ultra vires*:

Congress has imposed two conditions upon the free transportation of letters outside the mail: First, that the letters should be the letters of the carrier itself; and second, that they should relate to its own current business. The concurrence of both these conditions is essential to the privilege.

29 Op. Att'y Gen. 418, 419 (1912).

Since 1912, the United States Postal Service has, in a number of advisory opinions, continued to express an identical view of the letters-of-the-carrier exception. For example, in PES No. 76-4 Reconsidered, the Postal Service rejected the applicability of the exception to the carriage by a school-district mail system of letters of a teachers' association, stating:

We think it clear that inter-related though their activities and goals may be, the District and the Association are legally distinct entities in every sense, the Association's letters to its members can in no sense be regarded as sent by or addressed to the carrier-District, and the exception is therefore inapplicable.

Similarly, in PES No. 82-9, addressing the carriage in dispute here, the Postal Service reiterated its view that "the union materials at issue cannot be considered letters of the University" and that the letters-of-the-carrier exception is therefore not applicable. J.S. App. A-74.

Only one conclusion can be drawn from the above history. In order for letters to be covered by the letters-of-the-carrier exception, they must be letters *of* the carrier; letters *about* or *concerning* the carrier are simply not enough. Thus, contrary to PERB's suggestion, the Postal Service interpretation does not constitute an impermissible narrowing of the exception; on the contrary, PERB's interpretation, if adopted, would constitute an impermissible broadening of it. Thus, even if this Court were not guided by the principle that it should defer

to the construction placed upon a statute or regulation by the agency charged with its administration, especially when the construction is a contemporaneous one, *E.I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977), and were to consider the interpretation of the statute *de novo*, logic would compel acceptance of the University's construction and rejection of that of PERB.

C. The Letters of the Union Do Not Constitute the "Current Business" of the University Within the Meaning of the Statute or Regulation

We come now to the second requirement of the regulation, that the letters "relate to the current business" of the carrier. The Union's letters do not "relate to the current business" of the University, if that phrase is applied as Congress intended. In demonstrating that this is so, it will be helpful to begin by putting this second requirement of the regulation, and the arguments concerning it, in context.

PERB argues that it is sufficient if the letter "relates to the current business" of the University and is sent to a University employee "in his capacity as an employee" of the University. We have shown above that this reading does not square with the language of the regulation, but PERB may argue that the language of the regulation is at least awkward if the regulation means what the Postal Service says it means. Admittedly, it is not clear that the two requirements of the regulation are really independent of one another. It may be that if the first is satisfied, the second will also be satisfied—that is, if a letter is "of the carrier" it will necessarily "relate to the current business of the carrier." One might go on from this observation to argue that it should be sufficient that the letter relate to the current business of the carrier (doing away with the first requirement of the regulation), because: (1) only the "current business" requirement is explicit on the face

of the statute; and (2) a letter may, in a broad sense, relate to the current business of the carrier without being sent by or to the carrier.

There are two fatal flaws in this argument, and reflection on those flaws leads to the conclusion that Congress did not mean "relates to the current business" in the broad sense advocated by PERB. First, the express purpose of Congress in 1909, as we have shown, was to add to the statute language that would make it clear that the 1896 opinion of the Attorney General did indeed read the law as Congress intended—and that opinion expressly rejected the notion that all letters "relating" in some way to the business of the carrier could properly be carried under the exception. Second, acceptance of such an expansive argument would dramatically undermine the policy of the Private Express Statutes, because it would allow the University to deliver without postage any letters to anyone anywhere as long as those letters "related" to University business.

It seems that PERB is itself troubled by the absurdity of this result. Thus, PERB attempts to avoid the consequence of having erased the first requirement of the exception and given a broad reading to the second, by inventing a new requirement, not found in the second part of the exception, which happens to be satisfied in this case. PERB argues that it is sufficient for purposes of the statute that the letter should be sent to a University employee "in his capacity as an employee" and should relate to the current business of the University. But if the first requirement of the regulation must be eliminated because it does not appear on the face of the statute, whence comes the requirement that the letter be addressed to a University employee? That requirement is no more apparent on the face of the statute than the agency requirement. The answer is that the requirement, or some substitute for it, must be invented by PERB be-

cause without it the wrongness of PERB's interpretation is too evident: if the only requirement is that the letter relate to the current business of the carrier in the broad sense advocated by PERB, then the exception is not so much an exception as an end to the monopoly of the Postal Service. For example, a state tax agency could carry letters from a tax lawyer to his client giving him state tax advice; the University could carry letters from a high-school guidance counselor to a high-school student giving him advice concerning what college to attend; and a steamship line could carry letters from its passengers to their friends containing comments about how much the passengers were enjoying their cruise. When the phrase "current business" is given such a broad interpretation as to include, for example, "harmonious labor relations" within the current business of the University, the breadth of the exception is staggering. Moreover, there is no requirement under the letters-of-the-carrier exception, unlike the exception for carriage by private hands without compensation, that the carriage be gratuitous. Thus, an enterprising carrier could charge for the above carriage.

These outcomes were not meant to be. The Postal Service did not invent requirements unintended by Congress. What it apparently did was to attempt to express in two ways the same underlying intent—the intent that was articulated in the Attorney General opinion of 1896 and expressly embraced by Congress in 1909. The Attorney General and Congress rejected the view that "the carrying company's interest, actual or possible, in the subject of the correspondence makes the letter 'relate to its business,' in the language of the postal regulations." 21 Op. Att'y Gen. at 400. Rather, the phrase "relates to [its] business" was "used with reference to letters sent by or addressed to the carrying company, or on its behalf, and the form of expression was doubtless merely intended to exclude private correspondence between persons in the employ of carriers." *Id.*

The legislative history described above thus establishes that what Congress meant by its language was that the letter must *constitute*, or *be a part of*, "the current business of the carrier." See also 28 Op. Att'y Gen. 537, 540 (1910) (the 1896 Attorney General opinion "necessarily had the effect of limiting the right of the carrier to the transportation of communications relating to the corporate business, *because only such communications would be those of the corporation carrier itself as distinguished from its employees*") (emphasis added). Had Congress used the word "constitute" instead of "relate," it would have made more clear its intent that the letter be a letter "of the carrier," and it might have been unnecessary to clarify the statute through the first requirement of the regulation.

However, apparently because of the imprecision of the phrase used by Congress in codifying the 1896 Attorney General opinion, the Postal Service, to be sure of accomplishing the intent of Congress, adopted a regulation supplementing and clarifying the language of Congress with the language of the first part of the regulation. The clear language chosen by the Postal Service closely parallels the language of the Attorney General. When given its intended interpretation, the second part of the regulation (1) may be redundant in view of the first, and (2) is not met by the letters in question. The letters do not constitute the current business of the University because they are not, in the words of the Attorney General, "sent by or addressed to the carrying company, or on its behalf." 21 Op. Att'y Gen. at 400.¹¹

¹¹ PERB might argue that our suggestion that the phrase "current business" is redundant is in conflict with the principle that a statute or regulation should be interpreted so as to give meaning to all its parts. Principles of statutory construction, such as the one just cited, however, "are not rules of law but merely axioms of experience." *United States v. C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1953). Thus, even the most basic general principles of statu-

In all, the history suggests that there is a redundancy in the regulation, and for good reason—because the intent of Congress was very clear, but the language of Congress, which was incorporated in the regulation, was less clear, so additional language reflecting and clarifying the intent of Congress was added to the regulation. Thus, the letters of the Union do not “relate to the current business” of the University as that phrase was intended by Congress.

II. THE PRIVATE-HANDS-WITHOUT-COMPENSATION EXCEPTION DOES NOT APPLY BECAUSE THE UNIVERSITY'S HANDS ARE NOT “PRIVATE” AND THE CARRIAGE IS NOT “WITHOUT COMPENSATION”

Although PERB had held in its administrative proceedings that carriage of the union letters by the University was authorized by the statutory exception for carriage by “private hands without compensation,” the Court of Appeal’s disposition of the case on the basis of the letters-of-the-carrier exception obviated the need for it to consider the private-hands exception. Nonetheless, PERB has announced its intention to urge affirmance of the judgment of the Court of Appeal on this alternative ground, Motion to Dismiss at 14 n.11, making it necessary for the University to address the applicability of that exception.

tory construction must yield to clear contrary evidence of legislative intent. *National Railroad Psgr. Corp. v. National Ass’n of Railroad Psgrs.*, 414 U.S. 453, 458 (1974). In this case, the legislative intent with regard to Congress’s use of the phrase “current business” is so plain as to preclude reliance on the above-cited principle of construction with respect to the regulation.

The University’s invocation of this same principle of statutory construction in its discussion of the private-hands-without-compensation exception, *infra* at 33-34 under circumstances where no contrary legislative intent can be found—may arouse the hobgoblin of a foolish consistency but suffers from no other infirmity.

Like the letters-of-the-carrier exception, the private-hands-without-compensation exception is of long standing. See Act of Mar. 3, 1845, 5 Stat. 732, 736. The law currently provides that the Private Express Statutes do not prohibit carriage “by private hands without compensation.” 18 U.S.C. § 1696(c). Although intuitively one would not think that carriage of the letters at issue here is by “private hands without compensation,” the statute itself provides no definition of two key words—“private” and “compensation.” However, the consistent interpretation of this exception by the United States Government is quite narrow. The Postal Service has taken the position that this exception was “intended to permit the gratuitous carriage of letters that may be voluntarily undertaken out of friendship.” PES No. 82-9, J.S. App. A-72. Carriage of letters by the University under compulsion of state law hardly seems to be the sort of carriage contemplated by this exception.

A. Publicly Funded Carriage of Mail by a Government Agency Is Not Carriage by “Private Hands”

Although the term “private hands” is defined in neither the statute nor the regulations, and is, for that reason, uncertain of definition at the margin, there is virtually no definition of “private hands” that would include the University of California, unless “private hands” means “any hands other than the United States Postal Service.” The University is a vast, statewide governmental institution financially supported by the state and employing approximately 100,000 people. R. 279. Its employees are “public” employees, as demonstrated by the fact that the principal appellee in this Court is the California Public Employment Relations Board. If the Private Express Statutes are to mean anything, they must mean that an institution such as the University may not carry mail as “private hands.”

The private-hands-without-compensation exception is a sensible exception ensuring that a friendly gesture or

neighborly act between private citizens is not converted by the postal laws into a crime. The paradigm case is the individual who offers to deliver a letter to a friend he is about to visit. Friendly gestures such as this do not threaten a diversion of substantial revenues from the Postal Service and do not threaten the Postal Service monopoly. However, acceptance of PERB's expansive view of the exception would do both, since the impact of the broad statewide carriage ordered by PERB is many orders of magnitude greater than the impact of the kind of carriage that apparently was contemplated by the drafters of the exception.

The University does not suggest that only carriage based upon "friendship" is permissible, simply that it is the paradigm case of the kind of "private" carriage contemplated by the exception. The distinction advocated by the University is between "private" carriage and "public" carriage, the latter phrase encompassing business, commercial, and governmental relationships. This distinction between "public" and "private" is supported by the 1896 Attorney General's opinion, which expressed the view that neither railroads nor their employees, "while engaged in their business, can be considered as 'private hands'" under the private-hands-without compensation exception. 21 Op. Att'y Gen. 394, 401 (1896). In this case, the state has ordered the carriage because it deems the carriage to be in the public interest. That should be sufficient to bring the carriage into the "public" arena.

Not only the University's status as a governmental entity, but also the very scope of its mail system, should preclude it from being considered "private hands." To consider even a non-governmental mail system of such scope to be private would permit uncompensated carriage by any entity lacking a business relationship with the sender or addressee of the letter. Suppose, for example, that an eccentric billionaire, who had no business interests, decided to establish a private charitable postal serv-

ice that would carry letters free of charge—whether out of altruism or a desire to drive the United States Postal Service out of business. PERB apparently would argue that this charitable postal service constitutes "private hands," despite the fact that it may have thousands of employees. Yet it would hardly seem compatible with the revenue-protection purposes of the Private Express Statutes to deem this private postal service "private hands."

PERB may argue that a broad definition of the term "private hands" is supported by 39 C.F.R. § 310.1(e), which provides:

"Private carriage", "private carrier", and terms of similar import used in connection with the Private Express Statutes or these regulations mean carriage by anyone other than the Postal Service, regardless of any meaning ascribed to similar terms under other bodies of law or regulation.

That regulation provides no support for a broad definition of "private hands," however; in fact, it supports just the opposite. The apparent purpose of the regulation was to make it clear that the postal monopoly prohibits not only competition from the private sector, but also competition from the public sector. Thus, any entity other than the Postal Service, public or private, is deemed to be a private carrier regulated by the Private Express Statutes. However, it is a dangerous leap to assert that the word "private" in the phrase "private carriage"—which was meant to provide broad protection to the postal monopoly—means the same thing as in the phrase "private hands"—which was meant to provide an exception to that monopoly. Indeed, asserting such an identity of meaning would make the use of the phrase "private hands" superfluous in the very regulation in question, in derogation of the principle of statutory construction that "[i]n construing a statute [a court] is obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Section 1696 provides that the Private Express

Statutes do not prohibit "the conveyance or transmission of letters or packets by private hands without compensation." If the phrase "private hands" meant "non-Postal Service hands," it would have been unnecessary to use the phrase, since the statute simply could have provided that "the conveyance or transmission of letters or packets without compensation" is not prohibited.

The argument that all non-Postal Service hands are private is also difficult to square with Congress's amendment in 1909 codifying the letters-of-the-carrier exception. As discussed in Part I, above, Congress's primary purpose in enacting the 1909 amendment was to allow railroads to carry their own letters. However, if the private-hands-without-compensation exception were broad enough to cover railroads (and, presumably, universities), there would have been no need for the amendment, since the railroads would be "private hands," and, carrying their own letters, the railroads would be carrying them without compensation. See 42 Cong. Rec. 1904 (1908) (not the intent of supporters of amendment to legalize carriage of *all* letters "for which compensation was not charged") (remarks of Sen. Bacon). Thus, acceptance of PERB's interpretation of the private-hands exception would render meaningless the letters-of-the-carrier exception, since the latter would merely comprehend a subset of the former. See *Colautti v. Franklin* 439 U.S. 379, 392 (1979) ("elementary canon of construction [is] that a statute should be interpreted so as not to render one part inoperative").

B. The University's Carriage of Union Mail Under State Compulsion and with State Funding Is Not "Without Compensation"

Although no definition of "compensation" appears in the statute, it has been given a broad interpretation. The regulations have the following to say about the term:

Compensation generally consists of a monetary payment for services rendered. Compensation may also

consist, however, of non-monetary valuable consideration and of good will. Thus, for example, when a business relationship exists or is sought between the carrier and its user, carriage by the carrier of the user's letter will ordinarily not fall under this exception. . . .

39 C.F.R. § 310.3(c). Relying on this definition of compensation, the Postal Service has consistently taken the position that any business relationship between the carrier and the sender or recipient defeats the gratuitous character of the carriage. Thus, as far back as 1846 it was held that the Private Express Statutes "did not authorize the defendant to establish an express for the carrying of letters in connection with, or as part of his business of a merchandise express, *although no charge was made for letters as such.*" *United States v. Thompson*, 28 F. Cas. 97, 98 (No. 16,489) (D. Mass. 1846) (emphasis added).¹² The court concluded that "the tenor and scope of [the exception] was to prevent such competition with the post-office department."

In 1896, the Attorney General took a similarly broad view of the term "compensation" in rejecting application of the private-hands-without-compensation exception to letters carried by a railroad for a connecting line. 21 Op. Att'y Gen. 394 (1896). The Attorney General stated that the "express or implied obligation of railroads to carry letters for each other to remotely connecting lines would amount to 'compensation' within the meaning of the statute." *Id.* at 401.

The Postal Service has specifically rejected application of the private-hands-without-compensation exception to union letters carried by a school district. In PES No. 76-4 Reconsidered, the Service stated:

¹² See Act of March 3, 1845, 5 Stat. 732, 736 (excluding from scope of Private Express Statutes conveyance "by private hands, no compensation being tendered or received therefor in any way").

When, as here, the carriage of letters is performed by one party to an ongoing economic relationship for the benefit of another party, we consider that that act simply cannot realistically be isolated from the context of the relationship and characterized as being performed "without compensation."

Thus, where a provision of a collective bargaining agreement allows access by the union to the internal mail system, "compensation" exists, "even though no specific consideration is assigned to that item." It is difficult to understand, opined the Postal Service, "how the School District would justify the expenditure of public funds for the provision of a service from which it expected to derive no benefit."

Employing that reasoning, the Postal Service, in PES No. 76-17, concluded that the Detroit School Board's policy of carrying letters of a number of unions was forbidden by the Private Express Statutes, even though the policy was apparently voluntarily adopted and not based on a collective bargaining agreement. In responding to the University's inquiry in this case, the Postal Service made it clear that "compensation arises from the employment relationship itself." PES No. 82-9, J.S. App. A-71.

In PES No. 82-9, the Postal Service acknowledged the novelty of the carriage at issue here, which, unlike in previous cases on which the Service had rendered opinions, was not voluntarily undertaken but, rather, was held to be "an obligation imposed on it as a public employer by state law." J.S. App. A-71. Yet that obligation, concluded the Postal Service, demonstrates "that the carriage arises from the employment relationship." *Id.* The Postal Service then concluded that even apart from the employment relationship, carriage pursuant to a state-imposed duty to carry letters did not qualify for the private-hands-without-compensation exception for two reasons:

First, the state, through the appropriation of public funds, furnishes a major portion of the university's income. In so doing, it compensates the university for performing the duties which it instructs it to perform, including the carriage of the letters of employee organizations.

Second, apart from the apparent anomaly of a public agency being thought of as "private hands," we consider that it would be entirely inconsistent with the revenue-protection purpose of the Statutes to accept the principle that a duty imposed by statute is performed by "private hands without compensation." While the legislative purpose behind this exception is not clearly stated, it seems evident that it must have been intended to permit the gratuitous carriage of letters that may be voluntarily undertaken out of friendship.

Id. at A-72.

Despite the fact that the above interpretation constituted the official interpretation of the statutes and regulations by the federal agency charged with their enforcement and, as such, was entitled to considerable deference, *see Chemical Mfrs. Ass'n v. National Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985), PERB concluded that the Postal Service's interpretation was "unsupportable." J.S. App. A-32. PERB's analysis seems to have been two-pronged: First, it disagreed with the Postal Service that "assertion of statutory access rights under HEERA causes consideration to pass," and second, it held that the Postal Service was in error in concluding that the University was "compensated" for the carriage through its funding by a legislative appropriation. PERB simply failed to consider whether the broader rule that it was advocating was more consistent with the objectives of the Private Express Statutes in general, and the private-hands-without-compensation exception in particular, than the interpretation of the Postal Service. Ulti-

mately, what it should have done was to defer to the Postal Service's interpretation absent a conclusion that its interpretation was irrational, *see Chemical Mfrs. Ass'n v. National Resources Defense Council, Inc.*, 470 U.S. at 125, or that there were "compelling indications" that the Postal Service was wrong. *E.I. Du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 55 (1977) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)).

PERB's primary error was in focusing on whether legal consideration passed from the Union to the University—as if there were some requirement in the statute that the compensation must flow from the sender to the carrier. The more pertinent inquiry is whether the carrier receives compensation, whatever the source. If the purpose of the private-hands exception is to permit carriage that poses no threat to postal revenues, while maintaining the prohibition of carriage that does pose such a threat, then the source of the compensation is immaterial. In this case, postal revenues are threatened by mail carriage paid for by the state as surely as if the carriage were paid for by the Union.

One would think, at a minimum, that when the compensation comes from the same entity that orders the carriage of mail, the exception cannot apply. To illustrate, suppose that the State of California established and funded a "California Postal Service" and required that it deliver, without charge, mail from any person in California to any other person in California. The state would have thereby created a fully tax-subsidized postal service that would be a state-supported entity no more "compensated" (and no less "private") than the University of California. Thus, under PERB's reasoning, this agency would be free to displace the United States Postal Service for all mail within California. However, the private-hands-without-compensation exception was no

more intended to countenance the creation of a state postal agency than it was intended to countenance conversion of a state university into such an agency. The narrower view advocated by the University is far more faithful to the revenue-protection purposes of the Private Express Statutes.

The University submits that when carriage of mail is ordered by the state, it can never qualify for the private-hands-without-compensation exception, regardless of whether the legislature funds the carriage. For example, if in this case the state expressly declined to appropriate additional funds for the carriage of union mail, or even if the state ordered private entities to carry certain letters at their own expense, the carriage should not be deemed by "private hands" and it should not be deemed "without compensation." First, given the revenue-protection purposes of the Private Express Statutes, it is counter-intuitive to conclude that an individual or entity who is acting under compulsion of state law constitutes "private hands." Second, where the choice is to carry the mail for free or to fail to carry it and be faced with civil and criminal sanctions, the act of carriage is, in a sense, compensated by the lack of sanctions. The only difference between affirmative compensation for the carriage and a penalty for non-carriage is the difference between the state saying to the University, "If you carry this letter, we will pay you one dollar," and the state saying, "If you do not carry this letter, we will take one dollar from you." Regardless of how the transaction is characterized, it threatens the revenues of the Postal Service.

PERB may be generally correct that the narrow view of the private-hands-without-compensation exception would foreclose application of the exception "in *any* situation where an entity other than a private individual agrees to carry mail," J.S. App. A-35 (emphasis in original), but its dismay over that conclusion is unjustified. As

discussed above, state-compelled carriage is inconsistent with the purpose of the private-hands-without-compensation exception. As to PERB's suggestion that even carriage by private corporations would be barred since the source of funds would be the corporate assets, the conclusion is correct, but its reasoning is wrong. Where a private corporation *voluntarily* undertakes carriage of mail without charge, it is not the source of the funds paying for the carriage that will render the carriage impermissible, any more than carriage by a private individual is impermissible because the source of his funds is his private assets. Instead, what will generally render the carriage impermissible is that it will be supported by "non-monetary valuable consideration" or "good will" within the meaning of the regulation. Corporations do not generally act out of "friendship," but instead act to enhance business relationships. To the extent that they are attempting the latter, the carriage would not be uncompensated. To the extent that they are performing acts that do not enhance business relationships, they may have serious problems with their stockholders.

In sum, the University's carriage of union mail under state compulsion and with state compensation does not qualify for the private-hands-without-compensation exception, because the University's hands are not private and the carriage is not without compensation.

III. THE SUSPENSION FOR CERTAIN LETTERS OF STUDENT AND FACULTY ORGANIZATIONS DOES NOT APPLY BECAUSE A UNION REPRESENTING CUSTODIAL EMPLOYEES IS NOT A STUDENT OR FACULTY ORGANIZATION

The Court of Appeal also did not reach the issue of the applicability of the suspension of the Private Express Statutes for letters of "*bona fide* student or faculty organizations," but PERB has indicated an intention to rely on the suspension as an alternative ground for affirmance.

As discussed below, the suspension simply cannot be used to justify carriage of the letters in question.

In 1979, the Postal Service "suspended" the operation of the Private Express Statutes so as to permit "colleges and universities to carry in their internal mail systems the letters of their *bona fide* student or faculty organizations to campus destinations."¹³ 39 C.F.R. § 320.4. In the Notice of Proposed Rulemaking preceding adoption of the suspension, the Postal Service noted the "special qualities" that set college and university communities apart from other groups and explained that even though such organizations are "not legally part of the college or university, they often are recognized as performing important functions in the operation of the academic community." 43 F.R. 60615, 60619 (1978). The Postal Service warned, however, that the suspension was "not intended to cover . . . letters of outside organizations." *Id.*

The limited purpose of the suspension is apparent on its face, both in its limitation to *bona fide* student and faculty organizations, as described above, and in its restriction to internal mail systems "which operate in accordance with the *Letters of the carrier* exception in 39 C.F.R. 310.3(b)." 39 C.F.R. § 320.4. The result of the regulation is that letters of student and faculty organizations are considered, for purposes of the letters-of-the-carrier exception, to be letters of the University.

One can come to the conclusion that the suspension permits carriage of the letters of a union attempting to communicate with a university's custodial employees only through the most tortured of logic. It is undisputed that an organization of custodial employees is not a *bona fide* student or faculty organization. Thus, the letters at issue clearly fall outside the scope of the suspension. Yet,

¹³ 39 U.S.C. § 601(b) authorizes the Postal Service to "suspend the operation" of the Private Express Statutes "where the public interest requires the suspension."

through a combination of speculation and imagination, PERB concluded below, and apparently will argue here, that the suspension is applicable.

The reasoning that leads to a result plainly contrary to the language of the regulation is as follows. The Postal Service "has not ruled out the possibility that a labor organization representing faculty members at a college or university could use the internal mail system under the suspension."¹⁴ J.S. App. A-42. However, the Postal Service does "seem to require that the organization represent faculty members and not other employees." *Id.* Thus, the suspension creates a distinction between faculty unions and non-faculty unions, which constitutes invidious discrimination against non-faculty unions and violates the Equal Protection Clause of the United States Constitution. *Id.* Consequently, the logic goes, the suspension must be expanded to apply to non-faculty unions as well.

PERB's argument is based on the mere assumption that the regulation sets up a distinction between faculty and non-faculty unions, an assumption that is based in turn upon the Postal Service's failure to "rul[e] out the possibility" that the distinction exists. But, surely, before concluding that a regulation sets up an unconstitutional classification, something more must be shown than that the possibility that it sets up the challenged classification has not been "ruled out." As this Court reaffirmed just last term, a "cardinal principle" of statutory construction is that "this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.'" *Tull v. United States*, 481 U.S. —, 107

¹⁴ This conclusion was based upon the Postal Service's statement in PES No. 82-9 that "the suspension *might* cover the carriage of faculty union materials 'only by virtue of the breadth of the term "faculty organizations" and not because faculty unions are "truly an integral part of the life of the university."'" J.S. App. A-74 (quoting PES No. 76-4 Reconsidered) (emphasis added).

S. Ct. 1831, 1835 n.3 (1987) (quoting *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974)). Rather than follow this sensible dictum, PERB did precisely the opposite by interpreting the regulation in a fashion calculated to assist PERB in finding what it hoped would be an unconstitutional discrimination.

Even if PERB's analysis—i.e., that a distinction between faculty and non-faculty unions violates the Equal Protection Clause—were sound, the factual predicate for the argument was eliminated by the Postal Service in 1986. In PES No. 86-1, the Postal Service squarely ruled that an organization primarily concerned with collective bargaining was not covered by the suspension even though it consisted solely of faculty members. In ruling that the local chapter of the American Association of University Professors could not use the internal mail system of the University of Connecticut, the Postal Service reasoned that faculty unions do not "perfor[m] important functions in the operations of the academic community" as described in the Notice of Proposed Rulemaking. See 43 F.R. 60619 (1978). The Postal Service distinguished between an organization such as Phi Beta Kappa, which constitutes "an integral part of university life," and an organization such as a union, which deals with the university at arms' length and cannot be considered "a constituent component of the institution." Thus, because it turns out that the regulation does not establish the classification that PERB held unconstitutional, the suspension cannot be extended to apply to a union representing or seeking to represent the University's custodial employees.

CONCLUSION

The judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

18 U.S.C. § 1694, which is the statutory basis for the letters-of-the-carrier exception, provides as follows:

Whoever, having charge or control of any conveyance operating by land, air, or water, which regularly performs trips at stated periods on any post route, or from one place to another between which the mail is regularly carried, carries, otherwise than in the mail, any letters or packets, except such as relate to some part of the cargo of such conveyance, or to the current business of the carrier, or to some article carried at the same time by the same conveyance, shall, except as otherwise provided by law, be fined not more than \$50.

39 C.F.R. § 310.3(b)(1) (1986), the regulation embodying the letters-of-the-carrier exception, provides as follows:

Letters of the carrier. (1) The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the individual actually carrying the letters is not the person sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person (see § 310.3(b)(2)) and the letters must relate to the current business of such person.

The statutory basis for the exception for private hands without compensation, 18 U.S.C. § 1696(c), provides:

This chapter shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation, or by special messenger employed for the particular occasion only. Whenever more than twenty-five such letters or packets are conveyed or transmitted by such special messenger,

the requirements of section 601 of title 39, shall be observed as to each piece.

The regulation implementing the exception for private hands without compensation, 39 C.F.R. § 310.3(c), provides:

Private hands without compensation. The sending or carrying of letters without compensation is permitted. Compensation generally consists of a monetary payment for services rendered. Compensation may also consist, however, of non-monetary valuable consideration and of good will. Thus, for example, when a business relationship exists or is sought between the carrier and its user, carriage by the carrier of the user's letter will ordinarily not fall under this exception; or, when a person is engaged in the transportation of goods or persons for hire, his carrying of letters "free of charge" for customers whom he does charge for the carriage of goods or persons does not fall under this exception.

The suspension of the Private Express Statutes for letters of *bona fide* college and university organizations, 39 C.F.R. § 320.4, provides as follows:

The operation of 39 U.S.C. 601(a)(1) through (6) and § 310.2(b)(1) through (6) of this chapter is suspended on all post routes to permit colleges and universities to carry in their internal mail systems the letters of their *bona fide* student or faculty organizations to campus destinations. This suspension does not cover the letters of faculty members, students, or organizations other than *bona fide* student or faculty organizations of the carrying college or university. Colleges and universities choosing to provide their student or faculty organizations access to their internal mail systems are responsible for assuring that only letters of *bona fide* student or faculty organizations addressed to campus destina-

tions are carried. (See § 310.4.) For purposes of this suspension, "internal mail systems" are those which carry letters on, between, and among the various campuses of a single college or university and which operate in accordance with the *Letters of the carrier exception* in 39 C.F.R. 310.3(b).

The California statute providing a right of access by employees and unions to an employer's means of communication, Cal. Gov't Code § 3568 (West 1978), provides as follows:

Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act.

APPELLEE'S

BRIEF

(7)
No. 86-935



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,

and

**WILLIAM H. WILSON, as an Individual and
on behalf of the AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 371**

Appellees.

**On Appeal from the Court of Appeal
of the State of California
First Appellate District**

BRIEF FOR APPELLEE WILLIAM H. WILSON

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QUESTION PRESENTED

Does the carriage of union "letters" without postage by the University of California in its internal mail system, pursuant to a state-imposed statutory obligation, fall within the *Letters-of-the-Carrier* or the *Private-Hands-without-Compensation* exception to the Private Express Statutes?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD, *et al.*

Appellees.

On Appeal from the Court of Appeal
of the State of California
First Appellate District

BRIEF FOR APPELLEE WILLIAM H. WILSON

STATEMENT

California's Higher Education Employment Relations Act ("HEERA") went into effect on July 1, 1979. (Cal. Govt. Code 3560, *et seq.*) Shortly afterwards, William H. Wilson, the President of Local 371 of the American Federation of State, County and Municipal Employees ("AFSCME" or "Local 371"), at the University of Cali-

fornia at Berkeley, attempted to distribute a notice of a union meeting through the University's internal mail system. (J. S. App. at 83; R. Supp. at 281)^{1, 2}

Wilson and the union (which represented custodians on the Berkeley campus) had been allowed to use the internal mail prior to the time that HEERA went into effect. (J. S. App. at 83-84)³ Union materials were picked up by building leaders or supervisors at a central location and distributed to custodial employees at the

1. The Appendix to Appellant's Jurisdictional Statement is designated "J. S. App." The administrative record is designated as it is in PERB's brief, where "R." refers to the record in the first Court of Appeal proceeding, and "Supp. R." refers to the record in the second.

2. At the time the charge was filed, Local 371 had filed a request for recognition for a unit of custodians on the Berkeley campus. (J. S. App. at 84) In a subsequent unit determination hearing, PERB put the custodians into a University-wide "Service Employees" bargaining unit. (PERB Decision No. 245-H (1982))

3. Prior to HEERA, University employees had a right to "meet and confer" with public employers under Cal. Govt. Code 3500, *et seq.* Local 371 had long exercised this right. (Hearing Transcript, p. 7, R. 190)

various buildings on campus.⁴

In May, 1979, the manager of custodial services attended an orientation on collective bargaining, where he was informed that union notices could not be distributed through the internal mail system under University policy. He then told the supervisors not to deliver mail for Local 371 unless it had U. S. postage on it. (J. S. App. at 83)

On November 16, 1979, Mr. Wilson, "as an individual and on behalf of [Local 371]," filed an unfair labor practice with the Public Employment Relations Board ("PERB" or "Board"), alleging that the University had violated Cal. Govt. Code 3568 and 3571(a) by refusing to

4. Prior to January, 1979, the mail was distributed to "building leaders" through mailboxes at the central custodial office, who then delivered it to the custodians working at their respective buildings. In January, the central office was moved, and a new system of distribution was adopted under which supervisors, who were responsible for up to 15 buildings, picked up the mail at the central office and distributed it to the various buildings under their supervision. (J. S. App. at 83)

deliver the union's notices.⁵ (J. S. App. at 81)

The Board found that the University had denied Local 371 access to its internal mail system. It also found that the University had used the internal mail system to inform employees of its own views on collective bargaining when it ran a seven-part series in the "U. C. Employee," a monthly newsletter. Each article contained a statement to the effect that the University "does not endorse collective bargaining nor view it as desirable or inevitable." (J. S. App. at 84) The campus had also allowed the United Way, a private charity, to solicit funds using the internal mail system. The Chancellor had deemed this an "official University use." (J. S. App. at 84)

The Board held that Cal. Govt. Code 3568 entitled

5. Cal. Govt. Code 3568 provides, in pertinent part: "Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to . . . mailboxes and other means of communication. . ." Govt. Code 3571(a) provides that it shall be unlawful for a "higher education employer" to "interfere with . . . employees because of their exercise of rights guaranteed by this chapter." Govt. Code 3565 states that employees "shall have the right to form, join and participate in the activities of employee organizations."

employees to use the internal mail system and directed the University to "cease and desist from . . . (a) Denying employee organizations access to its internal mail system for purposes of communication with employees [and] (b) Interfering with employees' rights to participate in employee organization affairs by receiving communications from such organizations." (J. S. App. at 78)

The University thereafter obtained an Advisory Opinion from the Postal Service to the effect that the union notices could not be carried postage-free. (J. S. App. at 66)⁶ The Court of Appeal agreed to review the matter, but then remanded it to PERB for further proceedings, including a determination of "whether the statute (Govt. Code 3568) and the federal postal laws and regulations can be harmonized." (J. S. App. at 63)

On remand, PERB again found that management had used the internal mail system to disseminate its own views on collective bargaining. (J. S. App. at 84) It

6. A "letter" includes any "message directed to a specific person or address and recorded in or on a tangible object." (39 C.F.R. 310.1(a)) .

also found that, although there are no postal routes inside the Lawrence Livermore National Laboratory (which is part of the University), the University still denied employee organizations access to the mail system there. (J. S. App. at 51-52)⁷

The University again sought review in the Court of Appeal. In its second Opinion, the Court held that the *Letters-of-the-Carrier* exception applied to the union's notice because it was addressed to the individual employee in his "capacity as an employee of the institu-

7. It was stipulated on remand that Local 371 would use the internal mail system to distribute the following types of materials: (a) general notices of union activities including meetings, meet and confer sessions and other concerted activities; (b) union publications including newsletters having to do with union-related activities; (c) materials concerning Local 371's position on the benefits of collective bargaining and the rights of employees protected under the collective bargaining laws, including union-related election materials, information and advice; (d) general notices of changes or modifications in University rules, regulations and benefits affecting members of Local 371; and (e) other materials generally concerned with the business of Local 371 and members thereof. The union would not, however, use the internal mail system to communicate with individual employees on matters relating to their individual concerns unless there was no other way to contact them. (J. S. App. at 49)

tion," and because the Legislature had made collective bargaining "a part of the 'current business' of the University" when it passed HEERA. (J. S. App. at 9)⁸

SUMMARY OF ARGUMENT

This case involves a conflict between a state collective bargaining statute (which requires the University to carry "letters" for employee organizations) and the Private Express Statutes (which generally prohibit the private carriage of mailable matter on postal routes). When federal and state laws conflict, the courts first try to harmonize the statutory schemes and will not find federal preemption absent a "persuasive" showing that the nature of the subject matter permits no other conclusion or that the Congress has "unmistakably so ordered."

In this case, federal law creates an exception for

8. The determination of the California court is not challenged by Appellant and is controlling because "State courts have the primary responsibility of interpreting state and local laws." (*United States v. City of St. Louis*, 597 F.2d 121 (8th Cir. 1979), citing *Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973))

letters which relate to the "current business of the carrier," and the state court determined that the California legislature had intended to make collective bargaining an integral part of the affairs of the University. Thus, the first inquiry should be whether that legislative determination, as construed by the state court, brings the carriage of the notices within the *Letters-of-the-Carrier* exception.

Historically the courts have reconciled federal postal statutes with local law whenever possible. As early as 1817, the courts held that a "mail stage" could be stopped for traveling at an excessive rate, in a locality, and the driver prosecuted, without violating the federal prohibition against "retarding the passage of the mail." The same conclusion was reached in 1852 with regard to local law regulating the speed with which railroads carrying the mail could pass through populated areas.

In several early cases, this Court refused to give Congressional declarations that certain thoroughfares were "post routes" a broad preemptive effect and limited

the legal impact of such declarations to protecting the means necessary to carry out the purpose of the enactment, *i.e.*, the delivery of the mails.

In 1896, an Opinion of the Attorney General concluded that Congress had not intended the postal laws to prohibit railroads from carrying letters relating to their "current business." (The statute in effect at the time allowed only letters which "related to some part of the cargo" to be carried postage-free.) The same opinion said that the railroads could *not* carry letters for entities which had common business interests with the carrier (such as hotels and restaurants along the line). In 1909, Congress passed an amendment which generally adopted the Attorney General's Opinion.

The University says that the meeting notices involved here are similar to the letters which the Attorney General concluded could not be carried without postage. Indeed, the University argues that the union's interests are actually "adverse" to its own, and that, *a fortiori*, its letters cannot be carried under the Attorney General's reasoning.

This argument is without merit. What is involved here -- *i.e.*, a state statute imposing an obligation to carry letters concerning collective bargaining -- is analogous to situations in which local law has imposed certain requirements on the carriage of letters, rather than to situations in which entities with loosely related business interests have wanted their mail carried.

Shortly after the 1909 amendment, the question arose of whether a railroad could carry forms without payment of postage which a state agency required it to fill out and return. The Attorney General concluded that, when such an obligation is imposed by state law, "the fulfillment of the duty thus imposed is clearly a part of the 'current business of the carrier' within the terms of the statute."

In 1914, this Court considered whether letters could be carried by a railroad for a telegraph company with which it had a contract to cooperate on closely related business matters and held that the relationship was sufficiently interdependent for the 1909 amendment to apply.

In 1920, this Court decided that a mail carrier could not be required to obtain a driver's license from a state as a condition of carrying letters by vehicle. Although the requirement was held preempted, the Court cited with approval a lower court decision upholding the power of states to regulate the *manner* of driving vehicles while delivering the mail.

These cases establish that California can impose a requirement that the notices involved here be carried in the University's internal mail system as part of the collective bargaining process. The notices announced a union meeting to nominate officers, and such meetings constitute an exercise of the statutory right to "form, join, and participate in the activities of employee organizations." This Court has recognized that the purpose of such meetings is to maintain the "associational existence" of the union, which is necessary for it to "perform its statutory functions."

Here the local law neither impedes the delivery of the mails, nor interferes, in any meaningful sense, with the postal monopoly. Rather, it constitutes the exercise

of the police power by the state over a matter of significant local concern -- *ie.*, workable labor relations in the public sector. Accordingly, this Court should find that the determination of the California Court of Appeal that the Legislature wanted collective bargaining to be part of the business of the University is sufficient to bring the union's letters within the *Letters-of-the-Carrier* exception.

Finally, though the issue was not reached by the Court of Appeal (and need not be reached here), the *Private-Hands-without-Compensation* exception also applies. Carriage by "private hands" is defined as "carriage by anyone other than the Postal Service," which encompasses the University's carriage of the union's notices. No "compensation" is involved because the obligation is imposed by law. The Solicitor General's argument that such carriage should be restricted to instances of "friendship" cannot be supported historically and is inconsistent with prior ruling of the Postal Ser-

vice itself.⁹

ARGUMENT

I. THE STANDARD OF REVIEW.

When there is an apparent conflict between state and federal law, "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'" (*Merrill, Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973) (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963)))

In *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963), this Court noted:

[F]ederal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordered. (373 U.S. at 142)

9. PERB based its decision on constitutional grounds as well (J. S. App. at 40-42) with which Wilson agrees. This point is covered by amicus Faculty Association, and Wilson joins those arguments.

As shown below, the courts have always sought to reconcile the postal statutes with local law. (*United States v. Hart*, 27 Fed. Cas. 193, Case No. 15,316 (C.C.E.D.Pa. 1817), cited with approval in *Johnson v. Maryland*, 254 U.S. 51 (1920); *United States v. City of St. Louis*, *supra*, 597 F.2d 121 (8th Cir. 1979)) Further, the legislative history shows that Congress never intended to prohibit a state from requiring a state university to carry union announcements in furtherance of a statutorily mandated policy of collective bargaining.

II. THE LETTERS-OF-THE-CARRIER
EXCEPTION APPLIES TO APPEL-
LANT'S CARRIAGE OF LETTERS
FOR UNIONS PURSUANT TO
THEIR STATUTORY OBLIGATION
TO DO SO.

A. *The University's Interpretation of
the Regulation is Incorrect.*

Title 18, section 1694, of the United States Code
provides:

Whoever . . . carries, otherwise than in the
mail, any letters or packets, except such as
relate to the current business of the carrier,
. . . shall, except as otherwise provided by
law, be fined not more than \$50.

The regulation implementing this statutes states:

The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the individual actually carrying the letters is not the person sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person (see 310.3(b)(2)) and the letters must relate to the current business of such person. (39 C.F.R. 310.3(b)(1))

The University makes the following argument: Unless the individual carrying the mail is carrying his own letters, the regulation requires that "the University must be either the addressee or the sender of the letters" for the *Letters-of-the-Carrier* exception to apply. (Appellant's Brief at 16) The formulation of the Court of Appeal to the effect that the letters need only be sent to the employee in his "capacity as an employee of the institution" is incorrect. It fails to distinguish between the employee's "personal capacity" and his "representative capacity as an agent of the University." If the letters are not received in the latter capacity, then they "are not *to* the University." If the letters *are* "to the University," then the employee must receive

them as an "agent of the University" for the exception to apply. (*Id.* at 14) Far from being "agents of the University," the members of the union stand "in an arm's length (some would say adversarial) relationship with the University." (*Id.* at 17)

The University contends that the legislative history of the 1909 amendment which added the *Letters-of-the-Carrier* exception demonstrates that their "agency theory" is correct. The argument is that when Congress amended the statute, it adopted the reasoning of the Attorney General in 21 Op. Att'y Gen. 394 (1896). That Opinion says that railroads may carry letters related to their "current business," but may not carry letters for entities with which they have only loosely-related business interests (such as restaurants and hotels along the line). The University argues that carriage of letter to such entities could not come within the *Letters-of-the-Carrier* exception because the recipients were not "agents" of the railroad carrying the letters, just as the union members here are not "agents of the University."

Neither the legislative history of the 1909 amend-

ment, nor the historical development of the law in this area, supports the University's contention that there is a strict requirement that the recipient of the letters be an "agent" of the carrier. A brief review of the postal laws (including the 1909 legislative history) is useful in putting the University's contentions, and the respective governmental and private interests, in perspective. Appellee turns to that subject in the next section.

B. The Development of the Law of Private Carriage of Letters.

Our postal laws developed from the common law of England. There, in the Seventeenth Century, the government "farmed out" the mails "by grant or patent to individuals, and prohibitory legislation was enacted to protect the patentee in his right to perform the service and receive the compensation under the grant made." (*Williams v. Wells Fargo & Co. Express*, 177 Fed. 352 (8th Cir. 1910))¹⁰ Letters were "deliverable at the

10. In tracing the development of the law in this area, Wilson is aware of Judge Wright's observation that much is "shrouded in obscurity," and "even were the

post-office," where they were held until called for, except that in "post-towns, including London, the letters were deliverable within the town limits." Postmasters who extended deliveries beyond the town limits were "at liberty to derive an emolument from this extension of the business," and this became "a source of actual or expected profit." (*United States v. Kochersperger*, 26 Fed. Cas. 803, 807, Case No. 15,541 (C.C.E.D.Pa. 1860))

In 1656, England established a national Post Office which "secured the monopoly to the post master general and his deputies," and private carriage was thereafter prohibited. (*Id.* at 807-808) Indeed, the Act seems to have been passed "to secure to the official letter carriers of the post-towns an emolument from their deliveries beyond town limits." (26 Fed. Cas. at 808)

An Act of 1710 provided for a chief Post Office in

legislative intent less opaque, it might be robbed of currency by the not insubstantial developments of the intervening century." (*Associated Third Class Mail Users v. U. S. Postal Service*, 600 F.2d 824 (D.C.Cir. 1979)) Nevertheless, certain consistent principles do emerge, and they provide guidance in resolving the issue before this Court.

each colony. After the War of Independence, the colonies adopted many of the English statutes.¹¹ The Articles of Confederation of 1778 gave Congress "the sole and exclusive right and power of establishing and regulating post-offices from one state to another." (*Id.* at 808)¹²

Article I, section 8, clause 7, of the Constitution granted Congress the power "to establish Post-Offices and Post Roads."¹³ In 1789, the First Congress passed

11. The Continental Congress appointed Benjamin Franklin to be Postmaster General in 1775, and, "because of the trend toward war . . . undertook its first serious effort to establish a more secure delivery organization in order to maintain communication between the States and to supply revenue for the Army." (*U. S. Postal Service v. Council of Greenburgh*, 453 U.S. 114, 121 (1981))

12. An ordinance of October 18, 1782, provided that the Postmaster General "and no other persons" would have charge of the mails, but also said that "private cross-posts might, with the consent of the postmaster general or his deputy, be employed on any cross-road until a public rider could be established on it." (*J. Cont. Cong.* 672-673; see *Brennan v. U. S. Postal Service*, 439 U.S. 1345, 1347, fn. 2 (MARSHALL, Circuit Justice, 1978))

13. Unlike the Articles of Confederation, the Constitution did not expressly establish a postal monopoly (*U. S. Const.*, art. I, sec. 8, cl. 7), but it has con-

a law providing for "the temporary establishment of a post office" and appointment of a Postmaster General. (Act of Sep. 22, 1789, 1 Stat. 70) Several temporary enactments followed, until, by Act of May 8, 1794, the "first permanent post-office law" was passed, which, among other things, "prohibited the establishment, upon private authority, of any foot or horse-post, stage-wagon, or other stage-carriage, on any established post road. . ." (4 Op. Att'y Gen. 276, 278 (1843); see 1 Stat. 354, 360, ch. 23, sec. 14.) Prohibitory provisions of this nature remained a part of the various enactments which followed in the next several years. (See e.g., Act of Mar. 2, 1799, 1 Stat. 733, 735, ch. 43, sec. 12, and Act of Apr. 30, 1810, 2 Stat. 592, 595-596, ch. 37, sec. 16.) Each of these statutes, however, contained a provision generally exempting letters which related to the cargo of the carrier. (*Ibid.*)

The courts were soon called upon to interpret

sistently been held that Congress has the authority to do so under the "necessary and proper" clause. (U. S. Const., art. I, sec. 8, cl. 18; *U. S. Postal Service v. Brennan*, 574 F.2d 712, 714 (2nd Cir. 1978))

these enactments. In 1817, the government obtained an indictment against John Hart, "one of the high constables of the city of Philadelphia," charging him with "knowingly and wilfully retarding the passage of the mail" in violation of the Act of Apr. 30, 1810. (*United States v. Hart, supra*, 26 Fed. Cas. 193) Hart had stopped the "mail stage" on the grounds that it was "going at an immoderate rate, so as to endanger the lives and safety of the citizens." The court agreed that, if the ordinance were "in collision with the act of congress, there can be no question that the former must give way," but found no such conflict:

[W]e are of opinion that [the act of Congress] ought not be so construed as to shield the carrier against the preventive remedy, because a temporary stoppage of the mail may be a consequence. (26 Fed. Cas. at 194)

With the advent of steamers and railroads, the carriage of mail in private baggage and freight became more frequent. The Postmaster General's report of December 2, 1843, noted that "numerous private posts, under the name of expresses, had sprung within a few years into existence, extending themselves over the mail

routes between the principal cities and towns, and transporting letters and other mailable matter, for pay, to great extent." (26 Fed. Cas. at 805) Two Opinions of the Attorney General held such carriage unlawful. (4 Op. Att'y Gen. 159, 276 (1843)) Prosecutions were brought in several states in 1843 and 1844, although they proved largely unsuccessful. (*United States v. Adams*, 24 Fed. Cas. 761, Case No. 14,421 (S.D.N.Y. 1843); *United States v. Hall*, 26 Fed. Cas. 75, Case No. 15,281 (C.C.E.D.Pa. 1844); *United States v. Pomeroy*, 27 Fed. Cas. 588, Case No. 16,065 (N.D.N.Y. 1844); *United States v. Kimball*, 26 Fed. Cas. 782, Case No. 15,530 (D.C.Mass. 1844))

The Report of the Postmaster General of November 25, 1844, noted that "the government had been unable to suppress the private expresses," which continued to operate "upon the leading post routes." (26 Fed. Cas. at 805) Congress then passed an Act aimed at bringing them to an end. (Act of Mar. 3, 1845, 5 Stat. 732, 736-

737, sections 10-13; 26 Fed. Cas. at 805)¹⁴ Shortly thereafter, this Court, in *United States v. Bromley*, 53 U.S. (12 How.) 87 (1851), held that a boat "which regularly performed trips on the canal between Albion and Rochester," and on which "the mail was transported," could not carry a letter containing an order for tobacco, even though it was to be transported by return voyage, because the order "did not relate to the cargo or to any article on board the boat." (*Id.* at 97) (The *Letters-of-the-Carrier* exception had not yet been adopted.)¹⁵

14. The law concerned only thoroughfares actually designated as "post roads" by Congress. (*See, e.g.,* Act of May 8, 1794, 1 Stat. 354.) Only later did Congress declare *all* "public roads and highways while kept up and maintained as such" to be postal routes. (Act of Mar. 1, 1894, 23 Stat. 3) The law was not concerned with private expresses where there was no postal service. (*See* 14 Op. Att'y Gen. 152 (1872).)

15. The private expresses continued to be a problem. In 1858, the Attorney General concluded that the citizens of Brooklyn, who were "unwilling to be served by the legal carrier," could not organize their own local mail delivery system (9 Op. Att'y Gen. 161 (1858)), although the opposite conclusion was reached in 1872 with regard to the City of Davenport, which did not have regular mail delivery service. (14 Op. Att'y Gen. 152 (1872)) In *United States v. Kochersperger*, *supra*,

In 1852, the Attorney General was asked if local communities could restrict trains carrying the mail to six miles per hour. (5 Op. Att'y Gen. 554 (1852)) Relying on *United States v. Hart*, *supra*, 26 Fed. Cas. 193, he commented that

26 Fed. Cas. 803, the court concluded, after an exhaustive review of English and American law, that carriage of letters to and from the main post offices in Philadelphia by private express was not prohibited, although carriage between the main post offices was. (*Id.* at 812-813) But in *Blackham v. Gresham*, 16 Fed. 609 (C.C.S.D.N.Y. 1883), the court concluded that revisions of the postal statutes had resulted in *Kochersperger* no longer being good law, and, for this reason, "a private express for the transmission of mail matter within a city where letter-carrier routes have been established" was no longer allowed.

Each time the question of private expresses has arisen, the concern has always been to protect the postal monopoly because "some of the routes are profitable, and produce a revenue to the post-office department, but others are a burden, and exhaust this profit in their support. If the profitable routes are to be occupied by private individuals or companies, the consequence must be that the remote routes, although of equal importance to those interested in them, must be abandoned, or supported from the treasury of the United States; which is well known to be contrary to the policy of the government." (*U. S. v. Hall*, *supra*, 26 Fed. Cas. at 78)

When such regulations are fairly and discreetly made with intent to preserve the peace, safety, and well being of the inhabitants of the city, they may be said to flow from powers necessary and proper in themselves, which the act of Congress of the United States does not intend to take away nor impugn. (5 Op. Att'y Gen. at 557)

This was the state of the law when, in 1896, the Postmaster General asked the Attorney General for an opinion with respect to letters which did *not* relate to the *cargo* of the carrier, but rather to the *business* of the carrier. (21 Op. Att'y Gen. 394 (1896)) The Post Office Department had adopted a regulation allowing the carriage of letters which related "to the business of the railroad," but the statute still exempted only letters "such as relate to some part of the cargo." The Postmaster asked four questions:

1. Can the railroad companies carry, outside of the mails, not in Government stamped envelopes, any first-class mail matter except such as concerns the cargo carried by the [rail]road?

2. Is it proper for a railroad company to carry, outside of the mails, not in Government stamped envelopes, first-class mail matter intended for a connecting line?

3. Is it proper for a railroad company to carry, outside of the mails, first-class mail matter not in Government stamped envelopes, for companies, corporations, or private individuals operating car lines, transportation lines (passenger or freight), operating hotels, restaurants, or any other class of business that may either be connected or not connected with the railroad proper?

4. Can such companies as mentioned in the third question carry their own mail; and if so, under what circumstances? (*Id.* at 397)

The Attorney General concluded that Congress had not intended to prohibit "private methods of carriers on post routes for communicating directly with their own employees or with other persons." But he noted that the right extended only to "letters written and sent by the officers and agents of the railroad company which carries and delivers them, about its business, and these only." (*Id.* at 399) While letters could be delivered to connecting lines, they could not be sent through an intermediary lines. Even if the letters related to the "through business over the lines of all," they could not be carried without postage, and the same was true even if the intermediary carrier had some "interest, actual or possible," in the letters. Only letters "sent by or ad-

dressed to the carrying company, or on its behalf," fell within the exception. (*Id.* at 400)

Congress considered the matter in 1908 and 1909. There was an extended debate which focused on whether the Attorney General's Opinion that "the [Post Office Department] regulation is simply a recognition of the law" was correct (42 Cong. Rec. 1902 (Sen. Sutherland)), or whether, on the contrary, acceptance of that view was tantamount to "recogniz[ing] the power of a Department officer to amend a statute." (*Id.* at 1902 (Sen. Bacon))

Eventually, an amendment passed that letters which "relate to . . . the current business of the carrier" would be exempt from postage. (Act of Mar. 4, 1909, ch. 321, 184, 35 Stat. 1123)

All of the senators who spoke agreed that a railroad should have the right to "communicate with its own employees" (*id.* at 1903-1904 (Sen. Heyburn)) about the "management and conduct of the line." (*Id.* at 1976 (Sen. Fulton)) The issue was whether the postal statute

needed to be amended to make this explicit.¹⁶

One of the first questions to arise under the amended statute concerned whether a railroad could carry forms which it was required to prepare under a state law. The state agency which administered the law proposed to supply blank forms to the railroad "for use in reporting the information." The forms would then be sent "to the several local agents of the company throughout the State" by the railroad. The question was "whether the return of these completed forms by the express company, through its own agencies, outside of the mails without the payment of postage, is permitted." (28 Op. Att'y Gen. 537, 538 (1910)) The Attorney General held that it was:

When a State, by valid, lawful authority, requires a railroad company to make reports of its traffic, the fulfillment of the duty thus imposed is clearly a part of the "current business of the carrier" within the terms of

16. There was also general agreement that any amendment should not be construed to allow the railroads to carry "mail intended for others" (*id.* at 1976 (Sen. Sutherland)), or to set up "a network of railroad companies all over the United States carrying mail for one another." (*Id.* at 1905 (Sen. Sutherland))

the statute. (*Id.* at 539)

In this same opinion, the Attorney General ruled that letters of "an association of railroad companies having no corporate or distinct legal existence," which had been formed to "weigh all carload shipments" for the mutual benefit of the member railroads, could not be transported postage-free by the railroads. Nor could three railroad companies, which were distinct corporations that had been consolidated into one "system" under the common control of "one set of officers," carry letters for one another without postage. (28 Op. Atty Gen. at 542)

Soon thereafter, questions were posed about two categories of letters having to do with the Erie Employees Relief Association. (29 Op. Att'y Gen. 418 (1912)) The Attorney General concluded that correspondence relating solely to the internal affairs of the Association could not be carried postage-free, but that letters "concerning relations between the railroad company and the association" could. (*Id.* at 420) Such letters "relate[d] to the carrier's current business" inas-

much as they were "on the subject of the carrier's own relation to the relief association." (*Ibid.*)¹⁷

This Court considered the scope of the *Letters-of-the-Carrier* exception in *United States v. Erie Railroad*, 235 U.S. 513 (1914), and concluded that carriage of letters by a railroad and a telegraph company, pursuant to a joint enterprise agreement, did relate to the term "current business of the carrier." A narrow construction of the term "current business" urged by the government was rejected. (*Id.* at 521-522. *But cf. United States v. Southern Pacific Co.*, 29 F.2d 433 (D.Ariz. 1928), where *Erie Railroad* was held inapplicable because the two carriers were operated as separate corporate entities, even though one had a controlling financial interest in the other.)

In 1920, this Court, in an opinion by Justice

17. This Opinion is an early recognition that the relations between an association of employees and their employer does relate to the carrier's "current business." Significantly, this conclusion was reached before the Railway Labor Act was passed in 1926 (44 Stat. 577) and before the Norris-LaGuardia Act was passed in 1932 (47 Stat. 70), both of which were milestones in the development of a national labor policy.

Holmes, decided that an employee of the Post Office Department could not be required to obtain a license to drive a vehicle used to deliver the mail. (*Johnson v. Maryland, supra*, 254 U.S. 51) At the same time, however, the Court said that a Government employee "does not secure a general immunity from state law while acting in the course of employment" (citing *United States v. Hart, supra*, 26 Fed. Cas. 193, and, *Commonwealth v. Clossen*, 229 Mass. 329 (1918))¹⁸

In *United States v. City of St. Louis, supra*, 597 F.2d 121, a local ordinance prohibited letter carriers from traversing private property without the consent of the property owner, and a postal employee was arrested

18. In *Commonwealth v. Clossen*, a state statute required a driver "to keep to the right-hand side of the way" and required that turns be made in a particular manner. A mail carrier was convicted of violating the statute and appealed on the grounds that he was immune under the supremacy clause. While acknowledging that federal law prohibited anyone from obstructing or retarding the passage of the mails (35 Stat. 1127), the Massachusetts high court held that it did not "confer extraordinary rights upon mail carriers to use the ways as they please," nor did it "necessarily, or impliedly do away with the powers of supervision and control inherent in the state."

and fined. The government filed suit for declaratory relief that the ordinance conflicted with "federal postal regulations which provide that letter carriers may cross lawns while making deliveries if patrons do not object." (*Id.* at 123) By the time the matter reached the Eighth Circuit, a state court had interpreted the ordinance "to permit the traversing of private property by letter carriers with the property owner's consent." The Court held that, "As so construed, we find no conflict between the ordinance and the national regulation promulgated by the U.S.P.S." (*Id.* at 124)

In *United States v. City of Pittsburg*, 661 F.2d 783 (9th Cir. 1981), a local ordinance required letter carriers "to obtain express consent from residents before crossing lawns." (*Id.* at 784) The Ninth Circuit held that this frustrated the Congressional purpose of promoting the efficient delivery of the mail (*id.* at 785, fns. 2, 3), and so conflicted with the supremacy clause. (*Id.* at 786)

C. *Appellant's Reading of the Legislative History Is Incorrect and Does Not Support Its "Agency Theory."*

Appellant argues that the legislative history of the *Letters-of-the-Carrier* exception supports its "agency theory." This argument rests on the premise that Congress adopted the Attorney General's reasoning in responding to Question No. 3 (in 21 Op. Att'y Gen. at 397), when he concluded that letters could not be carried for entities with common business interests. The University argues that these entities are analogous to the union letters involved here. Indeed, Appellant contends that Mr. Wilson and the union have even less claim to postage-free carriage because they actually have an "adverse" or "arm's length" relationship to the University.¹⁹

19. The University argues that the 1909 amendment "was intended to embody the reasoning of the 1896 Attorney General opinion," which "clearly contains an agency requirement." (Appellant's Brief at 23-24) But there is nothing in that Opinion saying that the senders or recipients of letters must be acting as "agents" of the carrier for the exception to apply, nor is there anything in the Congressional debate or the statute to support this assertion. Congress did debate, to some extent, where the line should be drawn, but this debate

This analysis cannot withstand a closer look, principally because it mischaracterizes the nature of the interests and obligations involved. While Appellant says that Local 371's letters are similar to those described in Question No. 3, the more appropriate analogy is to instances where local law has imposed certain requirements which have been harmonized with the federal statute.²⁰

concerned the meaning of the term "current business," not whether the sender or recipient had to be an "agent of the carrier."

20. In each case involving related business interests, the issue has been how closely related the business enterprises were. Thus, although connecting lines could deliver mail to each other, no intermediate line could be used, even if the letters related to the "through business" of all. Nor could the letters of an association of railroads formed to meet the common needs of each be carried, or even the letters of railroads which were under common management. (21 Op. Att'y Gen. 394, 28 Op. Att'y Gen. 537; *United States v. Southern Pacific Co.*, *supra*, 29 F.2d 433) Indeed, even though *United States v. Bromley*, *supra*, 53 U.S. (12 How.) 87, was decided before the 1909 amendment, it relies upon the same principles. Clearly, the captain of the boat which carried the order for tobacco to Rochester had an "interest" in doing so because he was going to be paid for transporting the tobacco back to Albion. But the Court held that this was not a sufficient interest, and this is essentially the same distinction relied upon in the Attorney General Opinions noted above holding that the

In *United States v. Hart*, *supra*, 26 Fed. Cas. 193, the postal statute could have been read to prohibit *any* interference with the expeditious delivery of the mails, and the local ordinance could have been ousted. But the court's approach was to *reconcile* the postal laws with local governmental interests, and this same approach was followed 35 years later when a question arose as to whether localities could control the speed with which railroads carrying the mail passed through their communities. (5 Op. Att'y Gen. 554)²¹

related business interests were not strong enough for the exception to apply.

21. This Court has been unwilling to give a broad, preemptive effect to Congressional declarations that a particular thoroughfare is a postal route. In *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), this Court had declared a bridge erected across the Ohio River pursuant to a state statute to be "an obstruction of the free navigation" of the river (*id.* at 429) and entered a decree that it was to be elevated or abated. (13 How. 518, 578; 18 How. 429) Congress then passed an act declaring the bridge to be a "lawful structure" and further declaring it to be a "post-road for the passage of the mails of the United States." (18 How. at 429) The Court upheld the power of Congress to declare that the bridge was "lawful" and did not obstruct navigation, but refused to reach the question "whether or not congress possesses the power, under the authority in contention, 'to establish post-

In the same vein, when a state passed a law requiring certain reports to be filed by railways, carriage of those reports became part of the "current business of the carrier." (28 Op. Att'y Gen. at 538-539) This was not because the railroad company wanted to fill out the reports. Undoubtedly, it would have preferred not to. Rather, it was because the obligation had been imposed by the "valid, lawful authority" of the state. The attitude of the carrier toward compliance with the state law was not relevant to whether the reports were part of its current business.²²

offices and post-roads,' to legalize the bridge." (*Id.* at 431) Likewise, in *Searight v. Stokes*, 44 U.S. (3 How.) 151 (1845), this Court held that contractors carrying the mail for the government, who also transported passengers and freight in the same vehicles, did not thereby obtain an automatic right to free passage without payment of tolls on state highways. (3 How. at 170) And in *St. Louis v. Western Union*, 148 U.S. 92 (1893), this Court held that an Act of Congress authorizing the construction of telegraph lines along "any post roads of the United States" did not grant "an unrestricted right to appropriate the public property of a State," and so the City of St. Louis could impose a charge on telegraph polls within the city. (148 U.S. at 100-101)

22. The courts followed the same approach of harmonizing the postal statutes with local law in the recent cases of *United States v. City of St. Louis*,

The situation is slightly different when collective bargaining is involved, which, by its nature, assumes that both sides will *bargain*. This is different from a duty to gather and report information on state forms, as in 28 Op. Att'y Gen. 537, because it assumes, to some extent, an adversary relationship as each side seeks to gain what it can in the bargaining process. But "arm's length" bargaining should not be confused with the statutory obligation to afford employees the right to "form, join and participate in the activities of employee organizations." (See Cal. Govt. Code 3565.) Whether the University likes its employees to exercise this right is not relevant to the statutory obligation to

supra, 597 F.2d 121, and *United States v. City of Pittsburgh*, *supra*, 661 F.2d 783. In the *St. Louis* case, the federal regulation and the local law were harmonized because each could be construed as allowing letter carriers to cross private lawns absent an objection from the property owner. In the *Pittsburg* case, however, the local ordinance required the Postal Service to obtain an express consent from each property owner to traverse private lawns, and this imposed a "nightmarish administrative burden" on the Postal Service and interfered with Congress' expressed desire to improve the efficiency of mail delivery services. (661 F.2d at 785-786)

allow them to do so, any more than the attitude of the railroad toward the forms it was required to prepare for the state was relevant to whether doing so was part of its "current business."²³

Carrying the union's letters is similar to the situation which arose in 29 Op. Att'y Gen. 418, where it was held that the railroad could transport letters from the Erie Employees Relief Association which involved "the carrier's own relationship to the relief association." (29 Op. Att'y Gen. at 420) The "First Nomination Meeting" involved here is similar. Although not a direct communication to the University, it was anticipatory of such communications. This Court has recognized that the purpose of union meetings is to allow the union to "maintain its corporate or associational existence" which is necessary in order for it "to perform its statutory functions." (*Ellis v. Railway Clerks*, 466 U.S. 435

23. As this Court said in *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983), "the lack of an employer endorsement does not mean that the communications do not pertain to the 'official business' of the organization." (460 U.S. at 51, fn. 10)

(1983))²⁴

Such meetings are a necessary prerequisite to the union's meeting and negotiating with the employer. They assure that the union can maintain its "associational existence," and they constitute a direct exercise of the employees' statutory right to "form, join, and participate in the activities of employee organizations." (Cal. Govt. Code 3565)

24. Appellant characterizes this situation as one in which an outside entity (the "Union") is attempting to get access to the University's internal mail system. This ignores the facts that gave rise to this case, which involved an employee (Wilson) trying to inform members of the Local that a meeting was coming up. There was no outside "Union" usurping the University's mail system. Rather, it was a matter of one employee trying to communicate with others about a union meeting. (Apparently seeking to bolster its point that this case involves only a "Union," the University has renamed the parties. While the Court of Appeal designated the Real Parties in Interest as "William H. Wilson and [AFSCME] Local 371" (emphasis supplied), the University designates Appellees here as "[AFSCME] Local 371 and William H. Wilson, President, Local 371.")

*D. The Employees Do Not Have to Be
"Agents of the University" for the
Exception to Apply.*

Appellant says that the regulation was violated because the members of the union did not receive the notices as "agents of the University." It is true that the employees were not acting as "agents" in the sense that the University could control their discretion to attend the meeting or not. But control over the employee's conduct, in a collective bargaining context, should not be the test. Rather, the test should be whether the employee is receiving the notice as part of the collective bargaining process -- *i.e.*, whether he is exercising the right to "form, join, and participate in the activities of employee organizations."

The employees of the railroad who transported the state forms in 28 Op. Att'y Gen. 537 were doing so as "agents" of the railroad, not in the sense of protecting the railroad from the state's regulatory purposes, but in the sense of aiding the railroad to comply with an obligation imposed by law. The forms may well have been "adverse" to the interests of the railroad in the

sense that they could be used as a basis for controlling its activities or regulating its profits, but this did not mean that there was any less of a legal obligation on the part of the railroad's "agents" to carry them, or that they were any less a part of the railroad's "current business."

In the same sense, delivery of the notices here promoted the exercise of collective bargaining rights, and this might, in some parochial sense, have been "adverse" to the interests of University management. But the notices nevertheless did serve the interests of the University as a whole in complying with the statutory obligation to allow employees the full and free exercise of their rights under Cal. Govt. Code 3565, and so it did relate to the "current business" of the carrier -- which was to follow the law.²⁵

25. This situation is also analogous to one carrier delivering letters to a "connecting line" (as described in 21 Op. Att'y Gen. at 397, Question 2). That is, if employees have a statutory right to "participate in the activities of employee organizations," this must include the right to attend the union's meetings. Accordingly, the union should be able to deliver the meeting notices to the University *for delivery to* the employees, just as

In this regard, the notices were "letters of the carrier itself." (29 Op. Att'y Gen. at 419) Although they were not actually written by the University, such a literal requirement has never been imposed. In *United States v. Erie Railroad, supra*, 235 U.S. 513, the letters did not have to be written by the railroad (as opposed to the telegraph company) for the exception to apply. Nor did the state forms in 28 Op. Att'y Gen 537 have to be written by the railroad for the exception to apply. Rather the approach of the law has been to ask how closely related the maker of the letter is to the carrier, and, when the relationship is sufficiently interdependent, or when the obligation is imposed by law, to apply the exception. That principle should be applied here, and the union's notices should be deemed exempt.

one railroad could transport letters to where it connected with another line. Such notices would be "addressed to" the University, and delivery would be constitute part of the "current business" of the University inasmuch as the statute obliges the University to allow employees to attend union meetings, and such notices are a prerequisite to their doing so. Further, if the Chancellor can designate United Way literature as "official" University business (J. S. App. at 84), he could do the same for the meeting notices involved here.

*E. The Letters Did Relate to the
"Current Business" of the
University.*

With regard to the traditional second prong of the test -- that the letters "should relate to [the carrier's] own current business" (29 Op. Att'y Gen. at 419) -- the University argues that the notices of the union meeting fail the test. The term "current business," according to Appellant, cannot be read broadly because this would allow a carrier to deliver mail to virtually anyone with whom it has the most remote relationship. (Appellant's Brief at 27-28) Pursuing this logic, the University says, would allow a state tax agency to deliver letters from a tax attorney to his client; the University to deliver letters from a high school counsellor to a student; and a steamship operator to deliver letters to friends of passengers about what a good time they were having. (*Id.* at 28)

These examples have nothing to do with the situation at hand. None concerns a statutory obligation to carry the letters, and none involves the exercise of a statutory right to "form, join and participate in the

activities of employee organizations."²⁶

The Solicitor General makes a slightly different point, saying that Congress intended the word "current" to denote a narrow meaning synonymous with "the management of or the conduct of the line" (42 Cong. Rec. 1976 (1908) (Sen. Fulton)), or even "the daily operation and maintenance of the road." (*Id.* at 1904 (Sen. Bacon)) Thus, says the government, the exception should be restricted to "concrete matters susceptible of immediate action by the employer's representatives." (Brief of Solicitor General at 21)

The government made a similar argument in *United States v. Erie Railroad, supra*, 235 U.S. 513, and the Court answered as follows:

26. Appellant argues that the first part of the regulation supplements and clarifies the language of the statute, but then says that the second part is redundant, even though it was supposedly meant to "clarify" the statute. (Appellant's Brief at 29-30) Just why the Postal Service would use a redundancy to clarify supposedly ambiguous statutory language is far from clear.

[S]o confined in meaning it is not very clear what enlargement the new section is on the old one. We cannot so confine it. The statute certainly cannot mean that the described business should have no relation to the past and no connection with the future, however near. It may be that there might be a business so completely consummated or so much in speculation that it could not be described as 'current,' but the letters with which this case is concerned are not of either character. (235 U.S. at 521)

The Solicitor General's argument is no more persuasive here than it was in 1915. While it is true that the courts have not read the *Letters-of-the-Carrier* exception broadly, neither have they read it so narrowly that nothing other than the strictly internal correspondence of the carrier is permitted.²⁷

27. Although the Solicitor General argues that carriage of the union's letters would deplete the revenues of the government, this argument does not fit the facts here very well. The courts have often said that the Private Express Statutes are "revenue protection laws," and their purpose is to prevent the private sector from taking over the profitable routes while leaving those which operate at a loss to the government. There is no evidence here, however, that carriage of the union's letters would be profitable or unprofitable, and, more importantly, the carriage would not be undertaken for profit, but rather because state law required it.

F. Appellant Correctly Concluded that Letters about Collective Bargaining Constitute Part of the "Current Business" of the University.

It is apparent that Appellant concluded that dissemination of its own views on collective bargaining in the "U. C. Employee" is part of its "current business." As noted above, University management ran a seven-part series of articles on collective bargaining, each of which emphasized that the University "does not endorse collective bargaining nor view it as either desirable or inevitable." (J. S. App. at 84)

Dissemination of these views in the newsletter was either part of the University's "current business," or it violated the Private Express Statutes. Contrary to the arguments advanced here, Wilson submits that the University correctly concluded that the materials on collective bargaining could be carried postage-free because they did relate to the "current business" of the University.²⁸

28. The University's position is not aimed at protecting the revenues of the federal government. It is aimed at limiting the dissemination of union materials

G. *There Is No "Redundancy" in the Regulation.*

The University says that, for the letters to be "addressed to the person carrying them" within the meaning of 39 C.F.R 310.3(b)(1), "the University must either be the addressee or the sender of the letters." (Appellant's Brief at 13) The University also argues, however, that if *it* is the addressee, the employee who receives the letter must, by definition, be acting as an "agent of the University." But if the recipient is acting as the University's "agent" (because the letter is addressed *to* the University), then the second requirement of the regulation *is* redundant.

The second prong says that the letters must "relate to the current business" of the sender or recipient. However, if the recipient must be acting as "an agent of the University" to satisfy the first prong of the test,

and the exercise of collective bargaining rights. If this were not the case, the University would allow employees at the Lawrence Livermore National Laboratory to use its internal mail system because no postal routes are crossed there and no violation of the Private Express Statutes is involved.

then the second prong is already met, and *is* redundant, as the University concedes. (Appellant's Brief at 29-30)

A more reasonable reading of the regulatory requirement that the letters be "addressed to the person carrying them" is that the letters "should be the letters of the carrier itself" (29 Op. Att'y Gen. at 419), as opposed to letters of loosely-related business entities (as described in 21 Op. Att'y Gen. 394 and 28 Op. Att'y Gen. 537), even though they might have some "interest, actual or possible," in the matter. (21 Op. Att'y Gen. at 400) Contrary to the University's contentions, requiring that the letters be "of the carrier itself" does not impose a strict agency requirement. Rather, it requires only that the carrier not transport letters to or from entities with only loosely-related business interests.

The second prong of the regulation -- that the letters "relate to [the carrier's] own current business" (29 Op. Att'y Gen. at 419) -- would then have meaning. It would be necessary to ensure that the carrier "exclude private correspondence." (21 Op. Att'y Gen. at 400) That is, the first prong would require that the

letters not be to or from loosely-related business entities, and the second prong would require that they not be private correspondence of the carrier's employees.²⁹

Interpreted in this manner, the regulation is consistent with the historical requirements of the *Letters-of-the-Carrier* exception and gives meaning to all parts so that there is no redundancy.

III. THE MATERIALS MAY ALSO BE
CARRIED UNDER THE *PRIVATE-
HANDS-WITHOUT-COMPENSATION*
EXCEPTION.

A. *The University Also Misconstrues
the Private-Hands-without-Compensation Exception.*

Section 1696(c) provides that the Private Express Statutes "shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation. . ." The Code of Federal Regulations

29. The regulation also states that the "individual actually carrying the letters" must be "an officer or employee" of the sender or recipient. The purpose of this requirement is to prevent institutions from allowing casual employees to carry their internal mail and to prevent them from subcontracting the carriage. This is apparent from 39 C.F.R. 310.3(b)(2).

provides, in pertinent part:

Private Hands without Compensation: The sending or carrying of letters without compensation is permitted. Compensation generally consists of a monetary payment for services rendered. Compensation may also consist, however, of non-monetary valuable consideration and of good will. . .
(39 C.F.R. 310.3(c))

The University argues at length that its carriage of letters cannot be considered "by private hands" because it is a *public* institution. (Appellant's Brief at 31-34) However, the Postal Service defines the term "private hands" to mean "carriage by anyone other than the Postal Service." (39 C.F.R. 310.1(e)) Appellant's arguments are simply not in line with the regulation.³⁰

30. It is not necessary for the court to reach this point because the case can be decided on the grounds relied upon by the Court of Appeal, and Wilson urges the Court to affirm that judgment under the *Letters-of-the-Carrier* exception without reaching the *Private-Hands-without-Compensation* exception.

B. The Postal Service's Position Is Inconsistent And May Not Be Content-Neutral.

The Postal Service takes the position that the *Private-Hands-without-Compensation* exception applies only to private carriage of letters "out of friendship." (J. S. App. at 72) However, in an earlier Advisory Opinion, the Postal Service took the position that the exception *did* apply when a school district distributed circulars about food stamps for a community organization (PES-77-8), and its present position is clearly contradictory.³¹

Appellee Wilson submits that the earlier view was the correct one and that no distinction can logically or reasonably be drawn between that situation and the

31. This shift in position raises the possibility that the Postal Service's opinion as to whether the exception applies is based on the *content* of the letters. Why are circulars about food stamps carried by a school district deemed to be by *Private-Hands-without-Compensation* whereas a notice of a union meeting is not? This Court has rejected the notion that the Postal Service might base decisions about carriage on whether it approves of the views being expressed. (See *Ex Parte Jackson*, 96 U.S. 727 (1877): "Liberty of circulation is as essential to that freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value." (*Id.* at 733))

present one.³²

C. *There Would Be No "Compensation" Involved in the University's Carriage of the Union's Notices.*

Appellant argues that it receives "compensation" within the meaning of the statute and the regulation for delivering the union's mail because the California Legislature "funds" the University to carry its internal mail. However, the University is part of the state government and is no more "funded" by the Legislature than any other state agency. This is not "compensation." It is simply a "person" spending its own funds.


The Solicitor General argues that it is "completely irrelevant" that the State ordered the University to carry the union's notices because the State "presumably" did so "in order to obtain good will from its employee

32. The Solicitor General contends that the Postal Service's "construction of the *private-hands-without-compensation* exception is of long-standing, was developed contemporaneously with the enactment of the statute [and] has been applied consistently." (Brief of Solicitor General at 27) It is apparent that this statement is in error. (Cf. PES 77-8 and PES 82-9.)

and the unions that represent them, and ultimately to obtain benefits flowing from that good will." (Brief of Solicitor General at 26) There is no evidence in the record to support this "presumption." Further, the carriage of letters is only a small part of the collective bargaining process. While the Legislature stated in its findings that it did expect a significant *societal* benefit from granting collective bargaining rights to University employees (*see* Opinion of the Court of Appeal, J. S. App. at 9), these benefits do not flow just to the union, but to both sides, and to the State as a whole. Thus, no "compensation" to the University can be found in the "good will" supposedly derived from the carriage involved here.

CONCLUSION

For the reasons set forth above, the Judgment of the California Court of Appeal should be affirmed.

A handwritten signature in cursive script, reading "Andrew Thomas Sinclair".

ANDREW THOMAS SINCLAIR
Attorney for Appellee
William H. Wilson

APPELLEE'S

BRIEF

(11)
No. 86-935

Supreme Court, U.S.
FILED

OCT 21 1987

SPANIOL, JR.
CLERK

**In The
Supreme Court of the United States**
October Term, 1987

— o —
**THE REGENTS OF THE
UNIVERSITY OF CALIFORNIA,**

Appellant,

v.

**THE CALIFORNIA PUBLIC EMPLOYMENT
RELATIONS BOARD,**

Appellee,

and

**AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 371, and WILLIAM H. WILSON,**

Appellees.

— o —
**On Appeal from the Court of Appeal
of the State of California,
First Appellate District**

— o —
APPELLEE'S BRIEF ON THE MERITS

— o —
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QUESTION PRESENTED

The question presented is whether the California Court of Appeal and the California Public Employment Relations Board correctly decided that the Regents of the University of California can fulfill the statutory duty to carry letters regarding labor relations from unions representing University of California employees to those employees in the University's internal mail system in harmony with the federal Private Express Statutes.

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In The
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 October Term, 1987

THE REGENTS OF THE
 UNIVERSITY OF CALIFORNIA,

Appellant,

v.

THE CALIFORNIA PUBLIC EMPLOYMENT
 RELATIONS BOARD,

Appellee,

and

AMERICAN FEDERATION OF STATE,
 COUNTY AND MUNICIPAL EMPLOYEES,
 LOCAL 371, and WILLIAM H. WILSON,

Appellees.

On Appeal from the Court of Appeal
 of the State of California,
 First Appellate District

APPELLEE'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

This case initially arose under the Higher Education Employer-Employee Relations Act (HEERA or Act), California Government Code § 3560 et seq., a comprehensive statutory scheme enacted by the California Legislature in 1979 to govern labor relations between higher education employers and employee organizations representing employees of the University of California and California

State University and Colleges. Appellee, the California Public Employment Relations Board (PERB or Board), is the administrative body entrusted by statute with the interpretation and enforcement of the HEERA.

In case number SF-CE-4-H, an unfair practice charge was filed with PERB in 1979 (R 177)¹ by William H. Wilson, as an individual and on behalf of the American Federation of State, County and Municipal Employees, Local 371 (hereafter AFSCME or union).² The charge alleged that the University of California at Berkeley (U.C. or University) violated California Government Code §§ 3568, and 3571(a), (b) and (d)³ of HEERA by prohibiting the charging parties from distributing organizational literature

¹All references to the certified administrative record from the first writ proceeding (1 Civ. No. 54414) will be designated "R" followed by the appropriate page number(s). Separate volumes contain all references to the certified administrative record from the proceedings of the Board on remand from the appellate court; the writ proceeding arising therefrom is denoted AO29706. References to these volumes will be designated "Supp. R"

²The employees represented by AFSCME Local 371 are now part of an AFSCME systemwide service unit. See *In re Unit Determination for Service Employees of the Univ. of California*, PERB Decision No. 245-H, 6 PERC par. 13230 (1982).

³California Government Code § 3568 (Deerings 1982) provides:

Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act.

Section 3571 defines acts which are employee unfair practices against both employees and employee organizations.

through the University's internal mail system (Jurisdictional Statement Appendix (JS App.) A-115).

The University of California processed over 12 million pieces of mail during the 1978-79 fiscal year. (Univ. Ex. 14 at p. 6; R 209, 268, 398.) The mail was processed in the University mail system, described in Univ. Ex. 14, at R 394-399. The state funds the University of California, including its internal mail system, through general funds. (Univ. Ex. 14, at R 397.) University mail without U.S. postage and first class mail with U.S. postage were treated identically once received at the U.C. processing point. (R 223-224.)

Prior to 1979, AFSCME Local 371 and other unions were able to deliver organizational literature, free of charge, through the University internal mail system. (R 266.) During this period, AFSCME had deposited organizational literature first in the boxes of building leaders and later in the boxes of supervisors who then distributed the literature to potential AFSCME supporters in various campus buildings. (R 189, 192-193, 260-261.) Local 371 President William Wilson was notified on October 30, 1979, three months after HEERA became effective, that AFSCME could no longer use the campus mail system without affixing U.S. postage to its letters. (R 189-90.) After this notification, when AFSCME wished to communicate with employees by mail, Wilson had to deliver the literature himself. (R 195.) Wilson was unable to get to all the buildings and thus had to send some of the letters through the U.S. mail. Even after this was done, the literature was not received by all potential AFSCME supporters until after the event the literature was intended to advertise. (R 198.)

While University regulations now prevent employee organizations from using the campus mail system to deliver

organizational materials, the University itself used the system to distribute material relating to collective bargaining throughout the campus. (R 289-90.) For example, the University distributed an internal publication known as the *UC Employee*. (R 200.) No U.S. postage was affixed to the publication. In 1978-1979 this publication contained a seven-part series detailing the University's analysis of HEERA, the collective bargaining law governing U.C. employees. Each article in the series was prefaced with the following paragraph:

Employees of the University of California will be allowed to elect union representatives and engage in collective bargaining as of July 1, 1979. The University does not endorse collective bargaining nor view it as either desirable or inevitable. It did not oppose the recently adopted collective bargaining legislation because it is the University's position that an informed faculty and staff ought to have the opportunity to decide for themselves. (Union Ex. 1(a)-(f); R 201, 296, 299, 301, 303, 305, 307.)

The purpose of the *UC Employee* collective bargaining series was to provide information to the campus community regarding HEERA. (R 287.) Employee organizations were not allowed to state their view of collective bargaining in the publication. (R 287-88.) At the Lawrence Livermore National Laboratory, several U.C. publications such as *Management News Notes*, *Tuesday AM Update*, and *Newsline* came through the internal mail system. All these publications discussed collective bargaining from time to time. (Supp. R 532, 533, 537, and 541.)

In addition to prohibiting employee organizations from using the campus mail system, University regula-

tions provide generally that no non-University group may use the campus mail system without affixing postage. (Univ. Ex. 1; R 268, 312-313, 210.) These regulations specify, however, that a non-campus group *may* use the mail system or bulletin boards if approval has first been obtained from the Chancellor's office. (Univ. Ex. 1; R 268, 312, Supp. R 586.) At least one non-University group—the United Way—has been allowed to use the mail distribution system free of charge.⁴

In the proceedings before PERB, the University contended: (1) that "other means of communication" under California Government Code § 3568 does not include the internal mail system for unstamped mail; (2) that it is reasonable within the meaning of § 3568 to require postage; (3) that federal law prohibits union use of the internal mail system; (4) that denial of access to the mail system is not an unfair practice; (5) that union access to the mail system would impose a serious burden; and (6) that the charging parties suffered no harm by the acts of the University. (R 123, 100.)

⁴The United Way, designated a project of the Chancellor's office (R 253), distributed a packet of information to University employees through the internal mail system. Elements of the package were brought to the mail system for both assembly and distribution. While the Chancellor's office is surcharged for the cost incurred in assembling the United Way packages, it is not charged for delivery of the materials. (R 240, 237-238.) Also, a U.C. administrative services employee officially announced through the mail system that Bank of America had a Versateller machine at Lawrence Livermore National Laboratory. (Union Ex. 4; Supp. R 531 and 611.) Testimony also showed that Bank of America and the Women's Association have used the internal mail system at the lab. (Supp. R 521-523, 542.)

On appeal after hearing and decision by an Administrative Law Judge (ALJ), the Board issued a cease and desist order directing U.C. to stop unreasonably denying employee organizations access to the internal mail system, and employees the right to receive communications. (R 23-26, JS App. A-76.) A Petition for a Writ of Review in that case was filed December 23, 1981. In 1982, the University solicited and received an Advisory Opinion from the United States Postal Service (USPS) opining that carriage would contravene the Private Express Statutes (Ad. Op. PES 82-9; JS App. A-66).⁵

In *Regents of Univ. of California v. Public Employment Relations Bd.*, 139 Cal.App.3d 1037, 189 Cal.Rptr. 289 (1983) (JS App. A-58), the appellate court remanded the case to PERB to decide the question whether the claimed statutory right to use the internal mail system under HEERA § 3568 can be harmonized with the federal postal laws and regulations. Underlying such a decision, the court said, is the determination whether the University's regulations denying union access to the internal mail system are reasonable in light of all surrounding circumstances, including federal postal regulations. The court suggested PERB might also properly consider: 1) the University's use of its mail system to disseminate an employee newsletter expressing management's views on labor management issues; 2) the University's distribution of literature through the internal mail system solicit-

⁵The Private Express Statutes generally prohibit the private carriage of mail without postage, but provide for exceptions and suspensions of the prohibition where the public interest requires it. 62 Stats. at Large 777; 18 U.S.C. § 1696; 62 Stats. at Large 776; 18 U.S.C. § 1694; 84 Stats. at Large 727, 39 U.S.C. § 601.

ing charitable contributions deemed official business; 3) the Union's access to other means of communication; and 4) the burden which would be placed on the University's internal mail system. (*Id.* at p. 1042 n. 5; JS App. A-64.)

The Board considered the advisory opinion and the further factual findings of the ALJ.⁶ (Supp. R 65-77.) On October 18, 1984, the Board issued PERB Decision No. 420-H (Supp. R 1-45; JS App. A-14), in which it concluded that the total ban on the free use of the internal mail system by employee organizations was an unreasonable regulation in light of all the circumstances, including those outlined by the court. With regard to the application of the Private Express Statutes to the internal mail system, the Board decided that the Private Hands Without Compensation exception (18 U.S.C. § 1696(c); JS App. A-101), the Business of the Carrier (18 U.S.C. § 1694; JS App. A-100) and the Suspension for Bona Fide Faculty and Student Organizations (39 C.F.R. § 320.4; JS App. A-114) applied to allow carriage of union mail concerning labor relations in the internal mail system to University employees. PERB ordered U.C., *inter alia*, to refrain from "denying employees their rights under [HEERA] by re-

⁶The ALJ determined that: 1) the majority of the charging parties' materials are letters within the meaning of the postal regulations; 2) no compensation has been received by the University for delivery of employee organization mail; 3) University postal routes substantially overlap U.S. postal routes; 4) the University does disseminate its views on employee-employer relations through the internal mail system; 5) the mail system has been used by non-employee organizations, although sometimes it is deemed official business; and 6) any increase in mail burdens the system, but there was no evidence of "undue" burden.

fusing employee organizations access to its internal mail system." (Supp. R 43; JS App. A-44.)

Another writ of review proceeding followed. The court's decision under review here issued on June 9, 1986 (JS App. A-1), affirming the Board's order. The court determined that the Business of the Carrier exception and its implementing regulation (39 C.F.R. § 310.3(b); JS App. A-110) allow the carriage contemplated by the Board's order. First, the letters would be addressed to individuals in their capacities as employees of the carrier (JS App. A-8) and the content of the letters would relate to the current Business of the Carrier since the California Legislature had determined that cooperative labor relations and fulfillment of responsibilities under the collective bargaining laws were part of the University's business. (JS App. A-9.) In further support of its determination that union communication on labor relations matters with University employees was related to the business of the University under the California statutory scheme of bilateral collective negotiations, the court relied upon federal case law, *United States v. Erie R.R. Co.*, 235 U.S. 513 (1915) and *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). In sum, the carriage was within the exception, thus, there was no conflict with federal law. PERB's other grounds for decision were not reached.

A petition for hearing to the California Supreme Court was filed, but hearing was denied on September 10, 1986. (JS App. A-13.) As pointed out in PERB's Motion to Dismiss in this Court, *the later-dated documents reprinted at JS App. A-96-98 are not part of the record of this case and should be stricken as should U.C.'s refer-*

ences to these documents. (Brief at p. 7.) Indeed, counsel for PERB never had seen those documents before receiving the Jurisdictional Statement from U.C.

This appeal was noticed on November 11, 1986 and probable jurisdiction in this Court was noted on June 22, 1987.

For the reasons set forth hereafter, the Court of Appeal's decision and order should be affirmed by this Court.

SUMMARY OF ARGUMENT

Within a university campus today, many communications passing through the internal mail system do not have postage affixed. The Private Express Statutes, and their implementing regulations, generally forbid private mail carriage, but they also explicitly permit private carriage in certain circumstances. At least two exceptions allow U.C. to carry the letters of employee organizations to U.C. employees pursuant to U.C.'s statutory duty to do so under California Government Code § 3568.

1. Title 18 U.S.C. § 1694 generally prohibits regular carriage of mail on post routes, but excepts carriage of letters or packets "relating to the current business of the carrier". PERB, and the California Court of Appeal, carefully examined HEERA, a comprehensive statutory bilateral labor relations scheme enacted to,

[p]rovide the means by which relations between each higher education employer and its employees may assure that the responsibilities and authorities granted

to the separate institutions under the Constitution and by statute are carried out in an atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them.

Cal. Gov't Code § 3560(e)
(Deerings 1982).

PERB and the court concluded that this type of purpose statement in a statute, in conjunction with § 3568 mandating the carrying of mail on the subject of labor relations from employee organizations to employees, indicated the Legislature's belief that both the carriage of the mail and the subject matter of the communications constituted part of U.C.'s current business.

The view that a state law duty is part of a carrier's current business is supported by a 1910 Attorney General's opinion (28 Op. Atty. Gen. 537, 539) and the written policy statements of the Postal Service. (Section 16, *Restrictions on Transportation of Letters: The Private Express Statutes and Interpretations*, 5th Edition, July 1967 (POD Publication 111) (republished June 1973).) This view is further supported by *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). In *Perry*, this Court ruled that unions can hold an "official capacity" within a school district and that the communications of unions constitute school-related business. Essentially, the statutory mating of the union and the University differentiates this case from those involving voluntary employee associations which attempt to bargain without either a statutory mandate requiring the carrier to do so, or a contract.

A regulation promulgated in 1974 by the USPS, 39 C.F.R. § 310.3(b), narrows the statutory exception by add-

ing a requirement that the letters be sent by or addressed to the person carrying them. Assuming *arguendo* that the narrowing is valid, letters sent to the U.C. employees in their capacity as U.C. employees on the current business of U.C. fit within the regulation if the regulation is interpreted in a manner consistent with the statute. *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134 (1936).

Employees who, in their capacity as the employee component of U.C., receive mail related to the current business of U.C. will not always be "agents" of U.C., if "agent" is construed to mean that the employees act in furtherance of interests identical to those of U.C.'s administrative component. Sometimes employees will be at odds with the administration, but they are no less part of the University, especially in the context of state-mandated bilateral collective bargaining. As U.C. notes, reading "agency" into the regulation would make the actual language of the statute virtually unnecessary, whereas the slightly broader reading allowing employees to receive mail in their employee capacity gives meaning to both the statute and the regulation. *South Carolina v. Catawba Indian Tribe*, — U.S. —, 106 S.Ct. 2039, 1046 n.22 (1986).

2. The University can also carry mail from employee organizations to its employees under the Private Hands Without Compensation exception (18 U.S.C. § 1696(c)). The Postal Service agrees that even a large public entity such as U.C. can be "private hands"; the USPS defines "private carrier and terms of similar import" in 39 C.F.R. § 310.1(e) to encompass "anyone other than the postal service." Additionally, the USPS has opined that a school

district can carry mail under this exception (Ad. Op. PES 77-8).

Compensation is not received for carrying the mail. The University is not paid by the union, nor has the union bargained for this service or offered to exchange anything of value for it. There is not even a breath of a promise of good will within an economic relationship (cf. *United States v. Thompson*, 28 F. Cas. 97 (D. Mass. 1846) (No. 16,489)). Rather, U.C. is under a legislative mandate to carry the mail; it has a legal duty to do so which does not derive from an exchange with a union. Nor is the Legislature getting anything from the union—access to employees is part of a comprehensive statutory scheme aimed at meaningful bilateral collective bargaining for higher education employers and their employees.

Compensation within the meaning of this exception is not equivalent to state funding of the mail system (Ad. Op. PES 82-9). The state does not specifically reimburse U.C. for carrying union mail pursuant to HEERA, nor is there a line-item in the state budget for this. The funding is general, exactly like the funding of the school district mail system in which the USPS decided mail could be carried under the Private Hands Without Compensation exception (Ad. Op. PES 77-8). Generalized state funding is simply not the type of "consideration" for mail carriage that engenders entrepreneurial competitors with the Post Office; the Private Express Statutes were enacted to guard against entrepreneurial competitors, not effective collective bargaining agents. Finally, the avoidance of sanctions in this case is not analogous to compensation. U.C. was sanctioned; it received merely an order to carry the mail, not a monetary fine.

In sum, deference to the interpretations of the Postal Service is not appropriate here because, in the case of the Business of the Carrier exception, USPS' position is at odds with the language of the authorizing statute, and in the case of the Private Hands exception, it is inconsistent with USPS' previous opinions and regulations.

ARGUMENT

I. THE MAIL CARRIAGE AT ISSUE IS SIMILAR TO THE TYPES OF CARRIAGE OUTSIDE THE U.S. MAIL ALREADY OCCURRING DAILY AT THE UNIVERSITY AND ACROSS THE COUNTRY.

While U.C. and its Amicus dwell on congressional concern about the carriage of mail by railroads in the late 19th and early 20th century, the present-day usage of the Business of the Carrier and other exceptions to the Private Express Statutes by the University and other groups must imbue any decision by this Court. Utilizing the Business of the Carrier exception, the University informs its employees, through the internal mail system without the use of postage, that the administration believes unionization would be antithetical to the interests of the University and its employees. Through the internal mail system, without the use of postage, the University "under the auspices of the Chancellor", solicits donations to the United Way campaign. Another University administrator uses the internal mail system to send flyers to University employees about the Bank of America Versateller located on site at the Lawrence Livermore Laboratory. Through the inter-

nal mail system, without the use of postage, the Bank of America communicates directly with University employees at the Lawrence Livermore Laboratory, as does a Women's Association.

Also, in the public interest the USPS has decided to suspend the Private Express Statutes for all bona fide faculty and student groups. (39 C.F.R. § 320.4; JS App. A-114.) Thus, the administration, the faculty and the students can use the internal mail system without postage to communicate with each other and with staff. In the comments on the reasons for this suspension, the USPS noted that the practice of campus groups using internal mail systems was widespread and longstanding; therefore, the Postal Service recognized the public interest in a suspension for the different groups within the whole of the campus community. (Federal Register, Vol. 43, No. 250, p. 60619 (Dec. 28, 1978).)

The Congress prescribes the limits of the monopoly it has created, as recognized long ago in *United States v. Kochersperger*, 26 F.Cas. 803 (C.C.E.D.Pa. 1860) (No. 15,541). Hence, the Congress and the Postal Service have created many other exceptions to the Private Express Statutes, allowing millions of dollars of potential revenue to go uncollected.⁷ Most notably, neither newspapers nor financial institution documents are included in the prohibition against private carriage because they are

⁷Indeed, the economic rationale for the monopoly has been questioned, as has its uncertain constitutional basis. See, e.g., A Report of the U.S. Dept. of Justice, *Changing the Private Express Laws: Competitive Alternatives and the U.S. Postal Service*, at pp. 24-28 (January 1977); *The Post Office Monopoly*, 1 Monthly L.Rep. 385 (January 1849).

not defined as letters or packets. (39 C.F.R. § 310.1(a) (7) (ii), (iv); JS App. A-104.) Letters may be carried by private hands without compensation. (18 U.S.C. § 1696; JS App. A-100.) Extremely urgent letters are excepted from the Private Express Statutes (39 C.F.R. § 320.6; JS App. A-112) as are letters carried by special messengers (18 U.S.C. § 1696(c); 39 C.F.R. § 310.3(d)). Letters accompanying cargo are not included (39 U.S.C. § 602(a)(2); 39 C.F.R. § 310.3(a)), nor are letters carried to a post office. (18 U.S.C. § 1696(a); 39 C.F.R. § 310.3(e).) Suspensions are in place for data processing materials (39 C.F.R. § 320.2(a)), international ocean-carrier-related documents (39 C.F.R. § 320.5) and advertisements accompanying parcels or periodicals (39 C.F.R. § 320.7). In light of the disparate nature of the exceptions and their proliferation, it is fair to say that the purpose of the monopoly is "so open-ended and indeterminate that it provides scant guidance" for deciding whether mail carriage is prohibited by the Private Express Statutes or not. *Associated Third Class Mail Users v. United States Postal Service*, 600 F.2d 824, 827 (D.C. Cir. 1979), cert. den. 444 U.S. 837 (1979) (distribution of advertising circulars prohibited by the postal monopoly).

The carriage at issue here is of mail, without postage, concerning labor relations matters sent by unions to U.C. employees. Under California Government Code § 3568, public employee unions are given statutory access rights to University means of communication for the limited purpose of communications on labor relations matters. The Legislature has not granted such rights to the used car dealers or insurance salesmen discussed by Amicus

(Amicus Brief at p. 13), making those analogies patently inapt. The right to use internal mail systems in California is reserved to this small segment of the populace *by the Legislature* and derives from the recognized necessity for communication and access for meaningful organization by employees trying to realize the goals of peaceful bilateral collective bargaining.⁸

Thus, the carriage at issue here does not threaten a huge and unusual inroad on postal revenues. Rather, the question is, does this carriage fit within an exception to the Private Express Statutes? As will be shown below, the carriage is allowable under at least two exceptions.⁹

II. FACILITATING COMMUNICATIONS REGARDING LABOR RELATIONS FROM EMPLOYEE ORGANIZATIONS TO EMPLOYEES OF THE UNIVERSITY IS PART OF THE UNIVERSITY'S CURRENT BUSINESS AS IS THE SUBJECT MATTER OF THE COMMUNICATIONS; THEREFORE AN EXCEPTION TO THE PRIVATE EXPRESS STATUTES PERMITS DISTRIBUTION OF SUCH COMMUNICATIONS WITHOUT POSTAGE.

⁸It is flatly alarmist and totally lacking in foundation to claim that this legislatively granted right of communication is going to "seriously erode the postal monopoly" (Amicus Brief at p. 13) or intoxicate the state Legislature with such illusions of power that it creates, for some unknown reason, an entire state mail system. (U.C.'s Brief at pp. 9, 38.) Despite U.C.'s and Amicus' strenuous efforts to expand the narrow rights granted here, as described in the text, the case before the Court presents neither a new nor an unusually massive encroachment upon postal revenues.

⁹Appellee PERB is no longer pressing its argument regarding the Suspension for a Bona Fide Faculty and Student Organizations.

A. The Court of Appeal Correctly Decided that Communications Regarding Labor Relations From Employee Organizations to Employees Relate to the University's "Current Business" Under California and Federal Law.

In analyzing allegedly conflicting federal and state regulatory schemes, this Court has said:

Our analysis is also to be tempered by the conviction that the proper approach is to reconcile "the operation of both statutory schemes with one another rather than holding one completely ousted."

Merrill, Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127 (1973), quoting *Silver v. New York Stock Exch.*, 373 U.S. 341 at 357 (1963). (See also, *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 212 (1944).)

The Court of Appeal reconciled potentially conflicting statutes, rather than ousting either, when it reasonably decided that the statutorily mandated free access to U.C.'s internal mail system under California Government Code § 3568 is allowable because U.C. would be carrying letters related to its current business under the Business of the Carrier exception (18 U.S.C. § 1694). Carriage under an exception is no obstacle to the congressional design, but rather is part of the design itself.

Title 18 U.S.C. § 1694 (JS App. A-100) provides for criminal sanctions for private carriage of mail, but contains an explicit exception added in 1909 to § 1694's predecessor (35 Stat. at Large 1124), Rev. Stat. § 3985 (2d ed. 1878):

Whoever, having charge or control of any conveyance operating by land, air or water, which regularly per-

forms trips at stated periods on any post route, or from one place to another between which the mail is regularly carried, carries, otherwise than in the mail, any letters or packets, *except such as relate to some part of the cargo of such conveyance, or to the current business of the carrier, or to some article carried at the same time by the same conveyance, shall, except as otherwise provided by law, be fined not more than \$50.* (Emphasis added.)

Significantly, the statute is not entitled the "Letters of the Carrier" exception, nor does it make any mention of the sender or addressee.¹⁰ Simply put, the statute mandates that the letters a private carrier carries must relate to its current business or a fine will be levied. The U.S. Congress, not PERB or the California Court of Appeal, determined that the Postal Service could protect its monopoly yet forego revenue from carriers carrying letters relating to their current business.

The USPS has opined in Ad. Op. PES 82-9 (JS App. A-66) that the Business of the Carrier exception did not apply to the facts of this case because employee organization materials were not related to the "current business" of the University. For the reasons that follow, the USPS' opinion reflects both a lack of understanding of the nature of public sector labor relations as conceived by the state Legislature and the state courts, and an inconsistency in its own interpretation of what constitutes "current business".

¹⁰In the lower courts, all parties referred to the exception as the "Letters of the Carrier" exception, parroting the heading used by the USPS when it promulgated regulations in 1974. However, as explained in the text, the statutory exception enacted in 1909 is more properly referred to as the "Business of the Carrier" exception.

1. *The State of California, Through its Legislature and its Courts, Defines the Legal Obligations Constituting Part of the University of California's Current Business.*

In its decision, the California court held that "[u]nmistakably, the intent of the statute [HEERA] is to make collective bargaining a part of the 'current business' of the University." (JS App. A-9.) The court correctly concluded:

We only hold that where, as here, the State Legislature has clearly emphasized the public interest in developing harmonious labor relations between the University and its employees, the internal mail system may be used by the interested parties for purposes of relevant communications.

JS App. A-11.

This holding was derived from a comprehensive examination of the HEERA plan. (JS App. A-9.) The court noted that the Legislature explicitly determined that it was a matter of statewide concern to develop harmonious and cooperative labor relations between public institutions of higher education and their employees, citing § 3560(a). Further, the court recognized that § 3560(d) clearly stated that the higher education employers have a fundamental interest in the promotion of the harmonious relations and the responsibilities granted under the Act. Finally, the court looked at § 3560(e) which declares:

It is the purpose of this chapter to provide the means by which relations between each higher education employer and its employees may assure that the responsibilities and authorities granted to the separate institutions under the Constitution and by statute are carried out in an atmosphere which permits the fullest

participation by employees in the determination of conditions of employment which affect them. . . .

In light of such directive language, it was reasonable to conclude, as the court did, that the Legislature intended to allow access to U.C.'s internal mail system to unions for the purpose of communicating with U.C. employees on labor relations matters and that such access, and indeed the subject matter of the communications, is part of the current business of the University. (JS App. A-10-11; JS App. A-38-39).¹¹

Through the HEERA scheme, the Legislature indicated some of the methods by which "the fullest participation by employees in the determination of conditions of employment which affect them" could be achieved. Section 3565 of the HEERA affords employees the right to "form, join, and participate in the activities of employee organizations." It requires higher education employers to confer with non-exclusive representatives on request when employees want such representation, *California State Univ., Hayward*, PERB Decision No. 211-H, 6 PERC par 13115 (1982);¹² *Regents of the Univ. of California v. Public Employment Relations Bd.*, 168 Cal.App.3d 937, 214 Cal. Rptr. 698 (1985), and to negotiate with exclusive representatives, HEERA § 3570. Additionally, HEERA guar-

¹¹The Court of Appeal did not construe this language to allow "indisputably personal letters" to be delivered in order to foster good relations. (Amicus Brief at p. 22.) Rather, the opinions of both the Board and the Court of Appeal explicitly limited their holdings to communications on labor relations matters.

¹²Copies of all PERB Administrative Decisions cited in this brief have been lodged with the Court.

antees unions the right to represent and communicate with the employees. Cf. *Richmond Unified School Dist./Simi Valley Unified School Dist.*, PERB Decision No. 99, 3 PERC par. 10105 (1979). Inasmuch as PERB and the courts have interpreted § 3568 to permit employee organizations access to internal mail systems, the "current business" of the University includes the implementation of this HEERA right as well.¹³

U.C. and its Amicus mockingly characterize the court decision as holding merely that the goal of "harmonious labor relations" is part of U.C.'s business. (See, e.g., Brief at p. 16 n.8; Amicus Brief at pp. 21-22.) While the achievement of "harmonious labor relations" is undoubtedly the aim of the Legislature, using only the shorthand phrase belittles what the court actually decided after careful examination of the HEERA. The court decided that part of the business of the University is the successful operation of the entire statutory scheme. See, e.g., Cal. Gov't Code § 3560(e) (Deerings 1982), *supra* at p. 19.

The federal courts must accept the determination of the California courts on the matter of state law here, i.e.,

¹³Although not relied upon by the court, HEERA § 3561(c) emphasizes the need for communication among the staff. § 3561(c) states in pertinent part:

It is the policy of the State of California to encourage the pursuit of excellence in teaching, research, and learning through the free exchange of ideas among the faculty, students and staff of the University of California

Here, William Wilson, a staff member as well as the AFSCME local president, was attempting to communicate with other staff members on matters relating to University labor relations.

the current business of the University of California. After all, it is the business of the university of the state at issue.¹⁴ “[I]t is elementary that this court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state.” *Quong Ham Wah Co. v. Indus. Accident Comm’n*, 255 U.S. 445, 448 (1921). See also, *Six Cos. of Cal. v. Joint Highway Dist.*, 311 U.S. 180 (1940); *West v. American Tel. & Tel. Co.*, 311 U.S. 223 (1940); *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1932); *Kingsley Int’l Pictures Corp. v. Regents of Univ. of New York*, 360 U.S. 684, 688 (1959).

U.C.’s Amicus contends that the view of U.C.’s current business taken in Ad. Op. PES 82-9 should be accorded deference because “current business” may have a special meaning under federal postal law, different from the state-determined business of U.C. generally. (Amicus at pp. 22-23.) Curiously, the USPS did not contend that there was a special federal meaning of “current business” in Ad. Op. PES 82-9 (JS App. A-66); it relied instead on its purely intuitive view of the University’s business.

Moreover, Amicus’ contention that state-mandated communications on labor relations are not related to the business of the carrier in this case is flatly at odds with the previously stated USPS policy. First, the 1910 Attorney

¹⁴Significantly, the National Labor Relations Act does not cover state employers, including the University of California. See 29 U.S.C. § 152(2); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223 (1977). Plainly, nothing in the authorizing statutes of the Postal Service reflects a congressional intention that the USPS define the business of the University of California.

General’s opinion so favored by U.C. and its Amicus expressed the view that state law duties are part of the current business of the carrier:

When a State, by valid, lawful authority, requires a railroad company to make reports of its traffic, the fulfillment of the duty thus imposed is clearly a part of the “current business of the carrier” within the terms of the statute.

28 Op. Att’y Gen. 537, 539.

Second, although the regulations do not define “current business”, the pamphlet outlining USPS policy which predated the regulations, *Restrictions on Transportation of Letters: The Private Express Statutes and Interpretations*, Fifth Edition, July 1967 (POD Publication 111) (re-published June 1973), states in § 16 that “Any business of the carrier is deemed to be its current business when it comes up in such a way as to call for a current communication”. This definition was first voiced in 28 Op. Att’y Gen. 537, 543 (1910).¹⁵ Putting aside Ad. Op. PES 82-9,

¹⁵In contrast to the reliance U.C. places on the legislative history with regard to the meaning of “letters of the carrier”, legislative history is absent in its discussion regarding the meaning of “current business”. With regard to the meaning of “current business”, Senator Bacon referred to the “daily operation and maintenance of the road” (42 Cong. Rec. 1904 (1908)). Senator Fulton viewed the exception as relating only to “the management of or the conduct of the line” (42 Cong. Rec. 1976 (1908)). Clearly, the senators were particularly talking about railroads as carriers, and about daily railroad operation. They meant to exclude communications about “financial transactions or anything of that kind” (42 Cong. Rec. 1905 (1908)) (Senator Bacon). If this intent is subscribed to today, U.C. should only be allowed to send its communications regarding “the daily operation” of its mail system for free. U.C.

(Continued on following page)

the USPS definition of "current business" is thus quite expansive.

With these contradictory indications of the federal view of the meaning of "current business", the view of the California Legislature and California courts as to what in fact is the University's business should be dispositive, especially since it is well within the parameters of the 1912 Attorney General's opinion and the 1973 Post Office Department definition of "current business".

2. *Federal Case Law Supports the Determination that the Mail Carriage at Issue Here is Related to the Current Business of the University.*

Two distinct lines of federal case law also support the determination that implementation of HEERA rights is related to the current business of the University. In the First Amendment context, this Court has decided that a union's communications to employees pertain to the official business of the employer. Next, the few federal cases actually applying the Business of the Carrier exception support a broad interpretation that encompasses communications from non-carrier entities concerning the business of the carrier.

(Continued from previous page)

should not use the internal mail system to communicate regarding other aspects of its operation, including long-term financial planning or long-term curriculum planning or even to circulate academic papers for casual perusal by those interested with no response required. But neither the Solicitor General nor U.C. embrace this position. U.C.'s Amicus' current view, that "current business" should mean "concrete matters susceptible of immediate action by the employers' representatives" (Amicus Brief at p. 21), is, for no apparent reason, more broad than Senator Bacon's and Senator Fulton's view, but less broad than the policy statements of the USPS.

In *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, *supra*, 460 U.S. 37,¹⁶ the Court endorsed a school district's decision to allow, by contract, an exclusive representative's free use of the employer's mail system but not use by any other unions. The Court held that union use was consistent with the district's interest in "preserving the property . . . for the use to which it is lawfully dedicated" by allowing the union "to perform effectively its obligations. . . ." *Perry Educ. Ass'n*, *supra*, 460 U.S. 37, 50. The Court noted that union communications do not need the approval of the school district; such communications in themselves "pertain to the 'official business' of the [district]." (*Id.* at n.10.)

The University claims that "official business" does not have the same meaning as "current business." While it is true that "official business" has special meaning in the First Amendment context, the conclusion of *Perry* that union business is "school-related business" (*id.* at p. 48) necessarily gives guidance on the question whether union business is "related to the current business" of a university.

¹⁶The Court declined to express an opinion on whether the mail delivery practices involved in the case complied with the Private Express Statutes or other Postal Service regulations. (*Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, *supra*, 460 U.S. 37, 39, n.1.) The *Perry* Court approved limitation of access to the mail system to the exclusive representative because the mail system was made available only through a collective bargaining agreement with that exclusive representative. Additionally, however, the Court noted at p. 48 that before there was an exclusive representative,

[b]oth unions represented the teachers and had legitimate reasons for use of the system. PLEA's previous access was consistent with the School District's preservation of the facilities for school-related business, . . .

In *Perry*, the pertinent inquiry was whether the union's communications pertained to the school's business, for if they did so pertain, the mail system did not become a public forum and did not lose its insular nature. Here, too, the Court of Appeal sought to discern if the communications were "school-related" in order to determine if the mail system retained its insular nature. In the context of the Business of the Carrier exception, the inquiry is whether the union's communications to University employees on labor relations with the University can be considered related to the current business of the University. It is impossible to fathom a rational difference between communications on "school-related business" and communications "related to the current business" of the school.

Other federal case law supports a broad interpretation of the exception, allowing communications from non-carrier entities to carrier employees on the Business of the Carrier. The few court decisions considering the Business of the Carrier exception have held that where there is a level of interdependence between parties to a business relationship, the exception may apply notwithstanding the fact that they are separate entities. *United States v. Erie R.R. Co.*, *supra*, 235 U.S. 513; *United States v. Southern Pacific Co.*, 29 F.2d 433 (D.C. Az. 1928) (by implication). In *Erie*, the railroad, although a distinct business, was interested in the efficient and successful operation of a telegraph business operating along the railroad's lines. Since the letters the railroad carried promoted the successful operation of the telegraph business, the Court concluded that "the business comes within the description of the statute and is 'current.'" (235 U.S. 513, 520.) The Court should note that *Erie* arose before the regulation allowing

two companies engaged in a joint venture to carry each other's mail. (39 C.F.R. § 310.3(c).) In other words, the *Erie* court was defining the breadth of the words "business of a carrier" in 18 U.S.C. § 1694; those words encompassed the shared business interests of different but interdependent entities.

Both U.C. and its Amicus reply upon 29 Op. Att'y Gen. 418 (1912), JS App. A-116, to show that an employees' association does not come within the compass of this exception. (Brief at pp. 17-18; Amicus at pp. 17-18.) But the shared business interest of the Erie Railroad and the Erie Railroad Relief Association commented upon by the Attorney General in 1912 was flatly different from the shared business interest in this case. There, a voluntary association was involved, as opposed to a component of the state-mandated collective bargaining business of the carrier. While the Railroad may have been interested in the subject matter of pensions, pensions were not then a legislatively-mandated part of its business. Seventy-five years have passed, and collective bargaining has gained a legitimacy it did not enjoy in 1912. The California court's decision that legislatively-mandated bilateral collective bargaining constitutes part of the University's business brings the mail in the instant case within the exception. The efficient and effective functioning of the employees' representatives promotes the successful operation of part of the University's business, labor relations. See *Erie R.R.*, *supra*, 235 U.S. 513, 520.

B. Employees Need Not Be Agents of the University For the Business of the Carrier Exception to Apply.

Skipping past the statute (18 U.S.C. § 1694; JS App. A-100), the appellant focuses upon the 1974 regulation set forth at 39 C.F.R. § 310.3(b) (JS App. A-110), which provides:

(1) The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the individual actually carrying the letters is not the person sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person (see § 310.3(b) (2)) and the letters must relate to the current business of such person.

(2) The fact that the individual actually carrying the letters may be an officer or employee of the person sending the letters or to whom the letters are addressed for certain purposes does not necessarily mean that he is an officer or employee for purposes of this exception. The following factors bear on the qualifications for the exception: the carrying employee is employed for a substantial time, if not fulltime (letters must not be privately carried by casual employees); the carrying employee carries no matter for other senders; the carrying employee is a regular salaried employee and shares in all privileges enjoyed by other regular employees (including employees not engaged primarily by the letter carrying function), including but not limited to salary, annual vacation time, absence allowed for illness, health benefits, workmen's compensation insurance, and retirement benefits.

(3) Separately incorporated carriers are separate entities for purposes of this exception, regardless of any subsidiary, ownership, or leasing arrangement. When, however, two concerns jointly operate an enterprise with joint employees and share directly in its

revenues and expenses, either of the concerns may carry the letters of the joint enterprise.

Generally, the regulation narrows the Business of the Carrier exception by adding a restriction regarding senders and addressees. The regulation appears to differentiate between individuals and "persons"—"persons" being used to cover entities or institutions. The regulation only permits an individual or entity to deliver its own letters to another address or to pick up letters addressed to it from another individual or entity. Where the carrier is an institution rather than an individual, letters sent by or addressed to its employees must concern the "current business" of that institution and the carriage must be by an officer or employee of the institution. We assume for the purposes of argument that the restriction, not found in the language of the statute, regarding senders or addressees is valid. However, the regulation does not say that employees must receive the mail as "agents" of the entity.

1. *The Court of Appeal's Interpretation of the Regulation, Requiring a Carrier or its Employees to Send or Receive the Mail Carried, is Correct.*

Although there is no support in the congressional history¹⁷ for the University's additional requirement that the

¹⁷U.C. and its Amicus use the congressional history to read an agency requirement into the statute. We dispute that interpretation, and further note, as Judge J. Skelly Wright did in *Associated Third Class Mail Users v. United States Postal Serv.*, *supra*, 600 F.2d 824, 826 that legislative history regarding the Private Express Statutes can be "robbed of currency by the not insubstantial developments of the intervening century." As an example, the use of the internal mail system in this very case reflects the broadened scope of the Business of the Carrier exception. See discussion *supra*, p. 23, n.15. Additionally, the duty to bargain collectively with employees' representatives is a substantial development since 1909.

employees receive communications only as agents of the University, there is support for the notion that employees can send or receive the mail. The main concern in the discussions on the floor of the Senate in 1908 was that the mail be related to the business of the carrier and not some other business, because the railroads had been carrying mail for other businesses. (42 Cong. Rec. 1976 (1908) (Senator Sutherland); 21 Op. Att'y Gen. 394, 397-98 (1896).) That discussion assumed that employees could receive mail.¹⁸

The employee recipient and the employee carrier are both part of the entity "U.C." When employees receive union mail on the business of the carrier as employees of the University at the University and the carriage is by employees of the University, there is compliance with the regulation.¹⁹ If buzzwords are required, one could say that the employees receive the mail in their "official capacity" as employees—a crucial one-half of the bargaining equation under state law.²⁰ Only because the mail recipients are

¹⁸Unlike a railroad carrying mail from one railroad to another (21 Op. Att'y Gen. 394, 400) (Brief at p. 21), here the University carried mail between its own employees.

¹⁹U.C. sets up a straw man in its argument (Brief at pp. 26-28). PERB does not contend that the University can deliver anyone's letters to anywhere so long as the letters relate to the University's business. Instead, our contention is that the legislative history, the language of the statute and even the regulation support the view that letters to the entity's employees on its business can be carried by it without postage.

²⁰This Court has made it clear in *Perry Educ. Ass'n, supra*, 460 U.S. 37, 50 n.10, that the school district employer does not have to approve of the communications of the union in order

(Continued on following page)

University employees in the bargaining unit do they receive union representation as part of the labor relations scheme envisioned by the Legislature when it enacted HEERA. Many of them may not be union members at all.²¹

Thus, there is a middle ground between receiving mail on one's own behalf or as an agent of the University. One can receive mail in one's capacity as an employee as part of the University's business. While this is a narrow category, that is no fault; it is covered by the exception. In the complex community of a University, not every employee receiving communications through the internal mail system will have an identity of interest with the administration of the University. Suppose, for example, that the

(Continued from previous page)

for the union to have an "official capacity" in the school district. By the same token, the University does not necessarily have to agree with the communications to its employees in order for those employees to be receiving the communications in their capacity as employees.

U.C. claims it could be subject to an unfair practice charge if it monitored the union's letters. (Brief at p. 17.) This is mere speculation, of course, and a definitive solution is premature. Several possibilities spring to mind nevertheless. U.C. and its unions could work out an agreement on this matter, including one in which any mail the unions did not want opened would be sent through the U.S. mail. Otherwise, it would be PERB's role to harmonize the University's obligation to monitor the mail with the union's right to use the mail system. Charges can always be filed, but it is by no means clear a complaint would issue.

²¹In *Ad. Op. PES 82-9* (JS App. A-66), the USPS has tried to distinguish employees *qua* employees from employees as union members. This distinction is not workable in the HEERA context. Under HEERA, union members and nonunion members alike receive the labor union mail because they are employees.

Dean of the Law School at U.C. Berkeley wanted to hire a Professor from the School of Business at U.C. Berkeley, but the Chancellor wanted to keep the Professor where he was. The Dean would send the memo without postage. Although the University administration would be opposed to the action, it is from an employee to an employee on University business and plainly fits within both the regulation and statutory exception.

By its terms, the purpose of the statute is to exclude from the exception mail matter unrelated to the carrier. Employees *are* the University; it is the subject matter that will make the distinctions on what can be carried. U.C. says it monitors to ensure that only official University business is involved. (Brief at p. 4). Here, the mail is going to the University, to its employees in their capacity as employees (not, for instance, as individuals needing insurance), and the content of the union communications is clearly related to the business of the carrier.²² *A fortiori*,

²²Both requirements must be met to bring the communications within the exception. The employee receives mail as an employee and the mail is related to the business of the carrier. In contrast, U.C.'s hypothetical about the Director of Admissions receiving an insurance solicitation (Brief at pp. 15-16) fails to meet either requirement. He receives the mail as an individual and the mail is not about University business as defined by the Legislature. U.C. seems disrespectfully blind (Brief at p. 16 n.8, p. 29) to the legislative determination that fostering an informed choice of its employees' bargaining representative constitutes part of its business (Cal. Gov't Code § 3560(e) (Deerings 1982)), whereas fostering the choice of its Admissions Director's insurance company (when not an employment benefit) does not constitute part of its business. Indeed, it is more than a little disingenuous for U.C. to claim that it has no business interest in whether its employees choose to be represented by unions. (Union Ex. 1A-1F; R 201, 296, 299, 301, 303, 305, 307.)

the mail carriage contemplated by the Court of Appeal is well within the regulatory as well as statutory ambit of the exception.

2. *There is No Agency Requirement in the Statute or the Regulation.*

U.C. contends (Brief at p.29) that since employees must receive mail as agents of the carrier, the "business of the carrier" language is redundant, thereby exalting its invented agency requirement to the point of obviating the language of the statute itself! In contrast, the court's interpretation, allowing employees to receive mail on the business of the carrier, follows canons of statutory construction by avoiding redundancy and giving meaning to all words in both the statute and the regulation.²³ *South Carolina v. Catawba Indian Tribe, supra*, — U.S. —, 106 S.Ct. 2039, 2046 n.22; *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). U.C. admits "the language of the regulation is at least awkward if the regulation means what the Postal Service says it means." (Brief at p. 26.)

Notably, the regulation does not address the capacity of the recipient; it addresses the capacity of the carrier in

²³The University's argument that the employees must receive letters as agents of the University appears for the first time in the Jurisdictional Statement. U.C. has not consistently required an agency relationship when outside entities communicated with employees through its internal mail system. The record in this case shows that, for instance, the University allowed Bank of America to use its internal mail system at the Lawrence Livermore Laboratory (Supp. R at 521-523, 531 and 611), and in that instance the University had not sent out the communication "under the auspices of the Chancellor's office" as it had with other outside organizations, such as the United Way. (R at 253, 312.)

order to prevent a subcontractor from carrying mail for an entity in competition with the Postal Service. (See 39 Federal Register, No. 22, p. 3970, January 31, 1974.) A university can only receive mail through its employees, but those employees do not necessarily have identical interests with the administration of the University as illustrated, above at p. 32. Employee recipients are allowable under the regulation.

Nor does the major case concerning the exception, *United States v. Erie R.R. Co.*, *supra*, 235 U.S. 513, support the novel contention that an agency relationship must be present for the exception to be applicable. In the *Erie R.R.* case, the superintendent who sent the letters and the station master who received them were joint employees of the railroad and the telegraph company.²⁴ The content of the letters, however, makes it strikingly clear that both employees were acting in their capacity as employees of the *telegraph company* when the transmission took place. Nonetheless, the Court held that the letters were sufficiently related to the *business of the railroad* to come within the statutory exception. The Court did not find it necessary to discuss "agency". (235 U.S. 513, 516-17.)

While an agency's interpretation of a regulation based on its operative statute normally is entitled to judicial deference, it is neither necessary nor proper for a court to defer to an agency's interpretation of a regula-

²⁴It must be recalled that *Erie's* broad interpretation of the business of the carrier came before the regulation specifically allowing carriage of letters of joint enterprises. 39 C.F.R. § 310.3(b) promulgated September 16, 1974 and amended September 11, 1979 and September 11, 1980.

tion that is inconsistent with the system under which it was promulgated.²⁵ *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 n.8 (1980); *United States v. Larionoff*, 431 U.S. 864, 873 (1977). No deference is due particularly when the regulation or its interpretation constricts the scope of the statute. See *Scofield v. Lewis*, 251 F.2d 128 (5th Cir. 1958) (Internal Revenue Commissioner cannot limit congressional design through regulation); *In re Comm'n Policy Concerning the Non-Commercial Nature of Educ. Broadcast Stations*, 90 F.C.C.2d 895 (1982) (F.C.C. rule restricts public broadcasters in fundraising activities in a manner inconsistent with the statute). Regulatory restrictions are particularly frowned upon because they will likely undermine other rights.

The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations . . . but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail.

Ex Parte Jackson, 96 U.S.
727, 732 (1878).

²⁵As this Court said in *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, *supra*, 297 U.S. 129, 134:

The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

See also *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976); *Dixon v. United States*, 381 U.S. 68, 74 (1965); *Lynch v. Tilden Produce Co.*, 265 U.S. 315, 321 (1924).

Accordingly, this Court must examine 18 U.S.C. § 1694 as written, not as the Postal Service may have interpreted it, to determine whether there is any basis upon which to add the additional requirement that the receiver of the letter must be the agent of the carrier. The requirement of agency is not apparent within the plain words of the statute nor in the legislative history.

On March 3, 1909, the Conference Report on the revision of the Penal Code, including those sections regarding the postal laws, set forth quite clearly what the "business of the carrier" exception permitted:

[It] permits a common carrier to which a mail coach is attached to transmit by its servants to other stations on its route communications not enclosed in the mail, if such communications are confined to the carrier's business.

43 Cong. Rec.-House 3789-3790
(60th Cong., 2 Sess., March
3, 1909).

In sum, to the extent that the regulation must be read to require that employees receive mail as agents of the University, not simply as employees in their "official capacity" as employees of the University receiving mail related to the current business of the University, the regulation unlawfully narrows the ambit of the authorizing statute. We believe an agency requirement is not present in the statute or regulation.

III. THE UNIVERSITY MAY DELIVER EMPLOYEE ORGANIZATION MAIL UNDER THE PRIVATE HANDS WITHOUT COMPENSATION EXCEPTION.²⁶

Title 18 U.S.C. § 1696(c) provides, in relevant part, that the Private Express Statutes "shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation. . . ." Also relevant is the regulation promulgated in 39 C.F.R. § 310.3(c):

Private hands without compensation. The sending or carrying of letters without compensation is permitted. Compensation generally consists of a monetary payment for services rendered. Compensation may also consist, however, of non-monetary valuable consideration and of good will. Thus, for example, when a business relationship exists or is sought between the carrier and its user, carriage by the carrier of the user's letter will ordinarily not fall under this exception; or when a person is engaged in the transportation of goods or persons for hire, his carrying of letters "free of charge" for customers whom he does charge for the carriage of goods or persons does not fall under this exception.²⁷

²⁶Although the California Court of Appeal did not base its decision on this exception, the court's judgment is also correctly based on this rationale. See *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435-36 (1924); *Peoria & P.U.R. Co. v. United States*, 263 U.S. 528, 536 (1924); *Walling v. Gen. Indus. Co.*, 330 U.S. 545, 547 n.5 (1947); *Langnes v. Green*, 282 U.S. 531, 535-39 (1931).

²⁷During the pendency of *National Educ. Ass'n and the Am. Fed'n of Teachers v. Bolger*, No. 82-2320 (D.C. D.C.), a lawsuit challenging a Postal Service interpretation of this exception under which a school district was not allowed to carry mail for a union to its employees, the Postal Service changed its

(Continued on following page)

Under this section, whenever the mail carrier delivers mail in exchange for something received from the one whose mail is delivered, compensation will be deemed to exist, and the delivery will fall outside of the exception. (21 Op. Att'y Gen. 394 (1896).) Compensation will be found to exist whenever "consideration" is given for mail delivery, even if no money changes hands.

A. U.C.'s Carriage Constitutes Carriage By "Private Hands."

"Private carrier" and "terms of similar import" are defined by the USPS in 39 C.F.R. § 310.1(e) as terms used in connection with "carriage by anyone other than the Postal Service." Plainly, the University fits this description. Its existence as a publicly-funded entity does not exempt it from the all-encompassing "anyone other". Indeed, the regulation is even broader than the definition offered in 1896 by the Attorney General, (21 Op. Att'y Gen. 394 at 401): "'private hands' was evidently intended to cover all except common carriers on post

(Continued from previous page)

regulation. (See Ad. Op. PES 76-4 and 76-4 Recon.) Prior to October 11, 1979, 39 C.F.R. § 310.3(c) permitted "[t]he sending or carrying of letters *if no charge* for carriage is made by the carrier." (Emphasis added.) The regulation was modified to state that "compensation may also consist . . . of non-monetary valuable consideration and of good will." The Postal Service explained that the purpose of the regulation revision was:

. . . to clarify, rather than to change, the Postal Service's established position, reflected in previous Advisory Opinions, that "compensation" could take the form of non-monetary valuable consideration and of good will. (See 43 Fed. Reg. No. 250, pp. 60615, 60618 (December 28, 1978); Advisory Opinion PES 76-4 Recon., p. 3.)

routes."²⁸ Under either view, the University would be "private hands".

Moreover, in Ad. Op. PES 77-8, the USPS decided that the Private Hands Without Compensation exception applied to a school district. A school district, like the University, is a publicly-funded governmental entity as opposed to an individual. Thus, U.C.'s distinction between private hands and business/commercial/governmental hands is unsupported by the USPS, (Brief at p. 32), and indeed, no argument is made on the "private hands" point by Amicus.

B. The University Does Not Receive Compensation for Carrying the Union's Letters.

As early as 1878, in *Ex Parte Jackson*, *supra*, 96 U.S. 727, 730, this Court stated that Congress' power to create

²⁸U.C. suggests that our reading of the statute makes the use of the term "private hands" unnecessary. (Brief at p. 33.) The Attorney General's view of the meaning of "private hands" is one explanation of why the use of the phrase "private hands" is not unnecessary; under his view, common carriers cannot carry mail even without compensation. Another explanation is that not every phrase is essential, but may add to understanding. Further, U.C. argues that a broad reading of "private hands" would have made the Business of the Carrier exception unnecessary. (Brief at p. 34.) Again, the Attorney General's view is one way to square the two exceptions. Additionally, the Business of the Carrier exception was necessary to allow carriage between businesses in an economic relationship. See, e.g., *United States v. Thompson*, *supra*, 28 F. Cas. 97.

Furthermore, there may well be an area of overlap between exceptions; this is not of consequence. Thus, for instance, there is a special messenger exception, but there need not be because, by definition, special messengers do not make regular trips and would not be prohibited from carrying mail. 18 U.S.C. § 1694. Another example might be the occasional overlap between urgent letters and certain letters sent by special messengers.

a monopoly only extended to prohibition of carriage by others for *hire*. All parties concede that the Union has not paid for the mail it sent through the system and that the use of the system was not bargained for or offered to foster good will.

Significantly, because use of the internal mail system is part of state law, carriage of letters in this case is not part of any economic relationship between the parties. The legal obligation to carry this mail distinguishes this case from the economic relationship in *United States v. Thompson, supra*, 28 F. Cas. 97 (Amicus Brief p. 24; Brief at p. 35) and the relationship between school districts and unions which were the subject of Postal Service opinion letters. (Brief at pp. 35-36.) Access to the system has been *ordered* by PERB based on a statutory *right* to access.²⁹ Far from seeking good will, the University does not want to carry the mail and will not do so unless legally compelled. The facts of this case show that there is no furthering of the business relationship through the provision of the mail carriage. No bargaining or expectation of benefit was involved—there was no “quid pro quo”

²⁹ “[N]either the promise to do, nor the actual doing of that which a promisor is by law . . . bound to do, is . . . consideration.” (14 Cal.Jur.3d 304; *Moore v. Bartholomae Corp.*, 69 Cal.App.2d 474, 159 P.2d 436 (1945); *Bailey v. Breetwor*, 206 Cal.App.2d 287, 23 Cal.Rptr. 740 (1962); *Henry v. Lake Mill Lumber Co.*, 139 Cal.App.2d 620, 293 P.2d 909 (1956).) Consideration simply cannot be found where the benefit is the lawful entitlement of beneficiary. (Calif. Civil Code § 1605.)

of an exchange of services or favors between the University and the union.³⁰

Amicus “presumes” that the state “ordered its universities to [carry the mail] in order to obtain good will from its employees and the unions that represent them” (Amicus Brief p. 26), but presumes wrongly. HEERA explicitly defines U.C. as the employer here, not the state. *See* Cal. Gov’t Code § 3562(h) (Deerings 1982). The state does indeed have employees, but its relations with its employees are regulated under the State Employer-Employee Relations Act (Dills Act), Cal. Gov’t Code § 3512 et seq. (Deerings 1982). Moreover, the legislative history shows that the HEERA was generally modeled after the National Labor Relations Act (NLRA). (Calif. Assem. Res. No. 51 (1972 Reg. Sess.); see also, *Pacific Legal Found. v. Brown*, 29 Cal.3d 168, 177, 172 Cal. Rptr. 487 (1981). Under the NLRA, access rights are not explicit as they are under HEERA, yet were approved by this Court as early as 1945 in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802-03 (1945). The Court noted that the NLRB had frequently allowed access “to persons whose presence is necessary there to enable the employees effectively to exercise their right to self-organization and collective bargaining” (*Id.* at 802 n.8.) Rather than “giving” access rights to “get” something, the Legisla-

³⁰ Amicus seems to say that a letter transported in the course of business of the person or firm carrying the letter, as was done in the instant case, cannot fall under the “Private Hands Without Compensation” exception, while at the same time contending that it is not part of U.C.’s business to carry the letter. (Amicus Brief at p. 25.) The weakness of this internally contradictory argument is apparent.

ture decided that access rights were necessary to enable employees to communicate with their unions and endorsed efficient non-disruptive methods. These communication rights are part of the statutory scheme aimed at realizing meaningful representative bargaining.

As a fall-back position since an exchange of good will was not really present, the USPS opined that a *lack of good will* also means the exception does not apply because carriage would not be undertaken out of friendship. (Ad. Op. PES 82-9 at p. 7; JS App. A-72.) A decision on inclusion within an exception based on the temperament of the carrier is plainly on shaky ground. Even U.C. agrees that carriage other than on the basis of "friendship" is allowable. (Brief at p. 32.)

Perhaps because of this weakness in the narrowest interpretation of the exception, the USPS went on, in Ad. Op. PES 82-9, to expand its interpretation of "compensation" to include any situation in which state funding supports the operation of the mail system. But there is no line-item in the state budget for reimbursing the University for carrying employee organization mail. The funding for the mail system is granted entirely independently from the PERB order to allow access to the mail system. (Supp. R 588.) Although U.C. asserts that it is somehow "counterintuitive" to include state-ordered mail carriage within this exception (Brief at pp. 39-40), the *facts* show that no compensation is received for carrying this mail.

Every institution, public or private, that agrees to carry mail without charge on behalf of another must bear whatever increased operational costs result from its deci-

sion.³¹ Recognizing this, in Ad. Op. PES 77-8, the USPS found that the Private Hands Without Compensation exception *was applicable* to a school board carrying food stamp circulars on behalf of a community organization, notwithstanding the fact that implicit in the school board's agreement to carry the circulars was a decision to underwrite the cost of delivery. Since the Indianapolis School Board received revenue from a legislative body, its agreement to carry mail would be "compensated" in a manner no different than this case.

After issuance of the Indianapolis school opinion, but in the midst of a challenge to its interpretation of this

³¹Funding is not the equivalent of compensation for a service; otherwise the exception covers no one other than a self-supporting individual seeking no "good will" from the sender. (Brief at p. 38.) If A asks lawyer B to take a letter to a friend in Washington when B goes to argue a case in the U.S. Supreme Court, will it be illegal for B to take it because a client, or even the state, is paying for the airfare? Even if the state were not paying, if B so much as thought she might ask a favor in return someday, would it then be illegal?

On the other hand, PERB does not argue that this exception would encompass a state mail system for every person in the state or one run by an eccentric billionaire in order to put the Postal Service out of business. (Brief at pp. 32-33, 38.) However, it is not because states and eccentric billionaires are not "private hands". It is because systems of that magnitude are engendered by an entrepreneurial desire to compete with the Postal Service, and are plainly at odds with the purpose of the Private Express Statutes. See, *The Private Express Statutes and Their Administration: A Report by the Board of Governors of the U.S. Postal Service to the President and the Congress, Pursuant to Section 7 of the Postal Reorganization Act*, pp. 3-11, 59 (6/29/73). Competing entities identified by the Board of Governors were independent commercial delivery systems, common carriers (such as airlines, buslines and trains) public utilities and commercial courier services. (*Id.* at 71-86.) Intra-university mail systems were not mentioned. Nor is such a system even one as large as U.C.'s, on a scale with the railroads.

exception (*National Educ. Ass'n v. Bolger*, *supra*, p. 37 n. 27), the Postal Service changed its regulation to the one currently extant. Moreover, as the Board explained at length in its decision (Supp. R 20-32; JS App. A-27-36), until the USPS Assistant General Counsel Charles Hawley responded to a U.C. request for an opinion about the effect of the federal postal laws on the instant case, (Ad. Op. PES 82-9; JS App. A-66), the USPS had consistently interpreted this regulation to mean that legal consideration, as understood in the commonly accepted contract sense, must be exchanged between the carrier and the sender. (See Ad. Op. PES 76-4, 76-4 Recon, 76-9, 76-12, 76-15, 76-17, 77-8.) Indeed, Amicus used the term "consideration" in its brief to the Court. (Amicus Brief p. 24.) In Ad. Op. PES 82-9, however, the USPS changed its position by deciding that consideration can be found because the state funds the University's mail system. (Ad. Op. PES 82-9 at p. 6.)

Sudden changes in interpretation of both the statute and the regulation underscore the importance of this Court exercising its independent judgment in determining whether the underlying intent of Congress is reflected in the interpretation of this statute by the Postal Service. An agency abruptly changing its view of regulations undercuts its entitlement to deference. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 n.12 and 538 n.29 (1982); *Pollock v. Gen. Finance Corp.*, 552 F.2d 1142, 1144-45 (5th Cir. 1977) *cert. den.* 434 U.S. 891. Cf. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-43 (1976). Furthermore, assertion of authority to promulgate regulations that is neither consistent nor longstanding also undercuts the entitlement to deference. See *Southeastern Community College v. Davis*, 442 U.S. 397, 412 n.11 (1979).

Finally, U.C. suggests that avoiding sanctions is analogous to payment for carrying letters (Brief at p. 39), but the analogy is inapt. First, U.C. *was* sanctioned by PERB for failing to carry letters; it received merely an order to do so henceforth. No dollars were exacted. Secondly, one cannot presume that U.C. will desire to break the law when the California court's decision is affirmed. Stretching "compensation" to encompass "avoiding punishment" is certainly beyond the bounds of the most liberal reading of the language and history of the statute.

This case is flatly different from those examined by U.C. and its Amicus. Mail delivery is mandated because the policy of the State of California, as codified in HEERA § 3568, recognizes the importance of effective communications to stable employment relations. This statutory basis, not good will, economic relations, or consideration, will underlie the use of the mail system when it occurs again.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

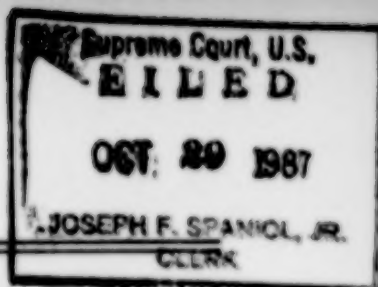
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Relations Board

October 1987

MOTION

(13)
No. 86-935



In The
Supreme Court of the United States
October Term, 1987

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THE REGENTS OF THE
UNIVERSITY OF CALIFORNIA,

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v.

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RELATIONS BOARD,

Appellee,

and

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 371, and WILLIAM H. WILSON,

Appellees.

— 0 —
On Appeal from the Court of Appeal
of the State of California,
First Appellate District

— 0 —
**OPPOSITION OF PUBLIC EMPLOYMENT
RELATIONS BOARD TO MOTION FOR LEAVE
TO FILE A BRIEF AMICUS CURIAE FOR
THE NATIONAL EDUCATION ASSOCIATION**

— 0 —
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October 29, 1987

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TO FILE A BRIEF AMICUS CURIAE FOR
THE NATIONAL EDUCATION ASSOCIATION**

The National Education Association (NEA) and the California Teachers Association have moved for leave to file a brief amicus curiae. Although substantively in support of the position of Appellee Public Employment Relations Board (PERB or Board), NEA suggests that the case may be moot. PERB refrained from consenting to the filing of the amicus brief in order to have an op-

portunity to refute this suggestion of mootness. PERB believes that if there is a live controversy between any one of the three named appellees and the University, this case is not moot under federal law. In fact, the controversy is live as to each appellee.

First, the transformation of a small local into a larger local does not moot the case. The American Federation of State, County and Municipal Employees (AFSCME) Local 371 is not now active because it has been succeeded by a larger AFSCME local wishing to exercise the legal rights at issue here. The larger service unit is the exclusive representative of the same employees who were in Local 371 in the same University and succeeds to Local 371's legal rights here. Such a change simply does not moot the case, as this Court has held in *De Veau v. Braisted*, 363 U.S. 144 (1960). As this Court said,

Appellee's claim that the cause is moot, since, after the commencement of this action, Local 1346 was disbanded and all employees under its jurisdiction came under the jurisdiction of a new local, Local 1, with offices in New York County, must fail. On the basis of what has been submitted to us, the new local is, in part, simply the old in a new dress.

Id. at p. 146, n.1.

Accord, *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 19 n.2 (1962). Indeed, the orders in this case run to "employee organizations" (JS App. A-78) and "AFSCME" (JS App. A-44), not Local 371 as NEA would have this Court believe (NEA Brief at p.5).

Second, the rights of the employee involved here, William Wilson, have yet to be vindicated. William H. Wilson

filed his charge *as an individual* and on behalf of his employee organization, which, at the time, was Local 371. (JS App. A-81.) With regard to Mr. Wilson's stake in this matter, the factual recitation by NEA is incomplete and consequently, misleading. The charge alleged, *inter alia*, a violation of California Government Code section 3571(a) (Deerings 1982). That section protects the rights of individual employees to participate in the activities of employee organizations from interference by the employer. (JS App. A-115.) Hence, the PERB orders in this case run to employees as well as employee organizations. (JS App. A-78; A-44.) William Wilson continues to participate in this case, and as his Brief indicates, he is interested in the vindication of his right to receive communications from employee organizations through the University's internal mail system, and as a representative of employee organizations, to send those communications.

Third, PERB has a continuing controversy with the University. This case arises from a writ proceeding under California law, in which PERB becomes the respondent when its decisions are challenged. PERB defends its own decisions, rather than having the real party in interest defend as a court does in a writ proceeding, precisely because PERB's broad orders are meant to protect a public interest beyond that of the specific parties involved in the underlying unfair practice charge. See *San Diego Teachers Ass'n v. Superior Court*, 24 Cal.3d 1, 11, 154 Cal.Rptr. 893 (1979); *Healdsburg Union High School District and Healdsburg Union School District*, PERB Decision No. 132, 4 PERC para. 11112 (1980). PERB is to "take such action and make such determinations in respect of [unfair practice] charges . . . as the board deems

necessary to effectuate the policies of [the Act]." Cal. Gov't. Code section 3541.3(i) (Deerings 1982). Here the Board deemed it necessary to issue a broad cease and desist order covering all employees and employee organizations (JS App. A-44) rather than, as NEA stated, specifically covering Local 371. As in *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) the "public interest in having the legality of the practices settled militates against a mootness conclusion." See also, *National Labor Relations Bd. v. Mt. Desert Island Hosp.*, 695 F.2d 634 (1st Cir. 1982) (cease and desist order upheld to protect other employees, not just the charging party).

The public interest in this case has yet to be vindicated because PERB has not tried to enforce its order against the University, pursuant to an informal policy of abating its orders while the orders are being reviewed. There has been no posting, nor has the University voluntarily allowed employees to receive communications from employee organizations through its internal mail system. Thus, the situation here is not unlike that in *National Labor Relations Bd. v. Raytheon Co.*, 398 U.S. 25 (1970). In that case, the National Labor Relations Board (NLRB) found that an employer had been guilty of misconduct prior to a union's defeat in a representation election, and the Board ordered a new election and issued a cease and desist order against the employer. While a petition for enforcement was pending in the appellate court, another election was held, the union lost again and this result was certified by the Board. The Court of Appeals held that the intervening election and certification had mooted the case. On certiorari, this Court reversed and remanded

for consideration on the merits. The Court held unanimously that since nothing in the record either showed that the specific acts complained of had not been repeated or gave any assurance that they would not be repeated in the future, the intervening events did not moot the case.

This Court noted that the Board was established by Congress with primary responsibility for the protection of the public interest in this area. (398 U.S. at 28.) In other words, the NLRB had an interest in the enforcement of its order against the unfair practices of the employer in order to secure the organizational rights of employees, even if the specific union originally involved no longer had an interest. By the same token, because the University is even now refusing to carry employee organization mail to employees in its internal mail system without postage, PERB has an interest in the affirmance and ultimate enforcement of its order against the University in order to secure the rights of employees, even if Local 371 is now subsumed under another local. See also, *DeBartolo Corp. v. National Labor Relations Bd.*, 463 U.S. 147, 153 n.5 (1983).

For all the foregoing reasons, this case is not moot, and the suggestion of NEA should be rejected.

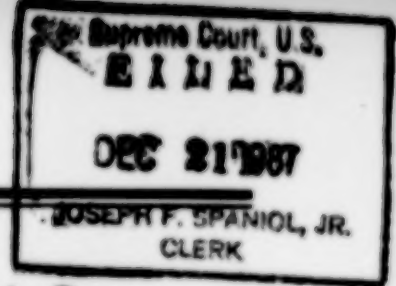
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October 29, 1987

REPLY BRIEF

No. 86-935



IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Appellee,
and -

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 371, and WILLIAM H. WILSON,
PRESIDENT, LOCAL 371,
Appellees.

On Appeal from the Court of Appeal
of the State of California,
First Appellate District

REPLY BRIEF FOR APPELLANT

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**On Appeal from the Court of Appeal
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First Appellate District**

REPLY BRIEF FOR APPELLANT

ARGUMENT

I. THIS CASE IS NOT MOOT

Amici National Education Association (NEA) and the California Teachers Association urge in their joint brief (at 3-10) that this case is moot. The University agrees with PERB that a continuing controversy exists, because PERB's cease-and-desist order has continuing effect despite the succession of Local 371 by a larger AFSCME local. PERB's order directs the University to cease and desist from:

Denying employees their rights under the Higher Education Employer-Employee Relations Act by re-

fusing *employee organizations* access to its internal mail system.

J.S. App. A-44 (emphasis added). The NEA suggests (Br. 9) that PERB did not intend its order to cover any organizations other than Local 371, apparently taking the position that PERB intended to require the University to grant access to Local 371 but not to Local 371's competitors.¹

One is compelled to wonder if the NEA really believes what it is saying. Can there be any doubt that if the NEA were denied access to the mail system it would argue that the University had violated PERB's order? The NEA finds "nothing in the record" to suggest that PERB meant what it said (Br. 9), but the more relevant question is whether there is anything in the record to suggest that PERB did *not* mean what it said. There is not. Therefore, under that order the University is not free to deny access to Local 371, Local 371's successor,² or any other employee organization, and the case is not moot.

II. CARRIAGE OF THE UNION LETTERS IS NOT AUTHORIZED BY THE LETTERS-OF-THE-CARRIER EXCEPTION

A. The Regulation Contains an Agency Requirement

The letters-of-the-carrier regulation requires that letters carried in the University's mail system be sent to

¹ The NEA's reliance on *NLRB v. Express Publishing Co.*, 312 U.S. 426, 435-36 (1941), is misplaced. Although the Court stated there that a broad injunction against *unlike and unrelated* violations was not warranted, it also stated that "the Board is free to restrain . . . other like or related unlawful acts." Denial of access by the University to employee organizations other than Local 371 would clearly be a "like or related unlawful act."

² The University also agrees with PERB's argument (Opp. at 2) that even if its order had named only Local 371, the order would also run to that local's successors. See *De Veau v. Braisted*, 363 U.S. 144, 146 n.1 (1960). See also Brief of AFSCME at 2 & n.2 (Because of a reorganization of AFSCME locals, Local 3210 now represents employees formerly represented by Local 371).

or from the University itself or to or from an agent of the University. It states:

If the *individual* actually carrying the letters is not the *person* sending the letters or to whom the letters are addressed, then such *individual* must be an officer or employee of such *person*

39 C.F.R. § 310.3(b)(1) (emphasis added). The only interpretation of the quoted phrase that is consistent with rules of grammar and syntax is that the individual carrier must be an employee of the sender or recipient.

In arguing that the letters-of-the-carrier regulation does not contain an agency requirement, PERB makes the same mistake that the Court of Appeals made: It paraphrases the regulation and then parses its paraphrase, rather than analyzing the language of the regulation itself. PERB states (Br. 29):

Where the carrier is an institution rather than an individual, letters sent by or addressed to *its employees* must concern the "current business" of that institution and the carriage must be by an officer or employee of the *institution*.

(Emphasis added). That is not what the regulation says. The regulation does not refer to employee-recipients of letters, and it does not say that the individual carrying the letters must be an officer or employee of *the institution*. Instead, it says that the individual carrying the letters must be an officer or employee of the person sending the letters or of *the person to whom the letters are addressed*. Thus, only if the union's letters are addressed to the institution (either directly or through an agent) is the regulation satisfied.

B. The Regulation Is Consistent with the Statute

Notwithstanding the consistency of interpretation of the letters-of-the-carrier exception by the federal government, the NEA suggests (Br. 15) that if the regulation means what the University and the United States say it means, then it is *ultra vires*, since the statute (18 U.S.C.

§ 1694) imposes as its only requirement that the letters relate "to the current business of the carrier."³ However, the legislative history belies the NEA's argument. In its opening brief (at 19-24), the University described the legislative history of the statute to demonstrate that the regulation is consistent with, if not mandated by, the statute. Congress' intent was to codify the interpretation of the statute's predecessor contained in an 1896 Opinion of the Attorney General. Interpreting a regulation promulgated under that statute, the Attorney General stated that the language "'relate to its business' . . . was used with reference to letters *sent by or addressed to the carrying company, or on its behalf.*"⁴ 21 Op. Att'y Gen. 394, 400 (1896) (emphasis added). Thus, the current regulation is fully consistent with the intent of Congress.

A conclusion that Congress intended to permit carriage of letters that are neither to nor from the carrier assumes that Congress meant to allow institutional carriers benefits that individuals do not enjoy. It is undisputed that individuals may carry only their own letters; they may not carry letters of others even if the letters concern the business of the individual. It seems highly doubtful that Congress intended to grant institutions not only the privilege that individuals had of carrying their own letters but also the privilege of carrying letters of anyone else as long as the letters happen to "relate" to the institution's business in some way. See 42 Cong. Rec. 1903 (1908) (Remarks of Sen. Heyburn) ("It is not in-

³ It should be noted that this argument is inconsistent with PERB's argument (Br. 29) that there *is* a requirement that letters be sent to employees in their capacity as employees.

⁴ Despite appellee Wilson's suggestion (Br. 33 n.19) that the Attorney General's opinion did not require an agency relationship, it is clear that when the Attorney General referred to "letters sent by or addressed to the carrying company, *or on its behalf,*" he was speaking in agency terms. When one acts "on behalf" of another, one is acting as an *agent*. See *Restatement (Second) of Agency* § 1 (an agent "act[s] on [the principal's] behalf and subject to his control").

tended that a railroad company should be permitted to carry its own general messages on any other terms than the general public may").

PERB erroneously relies on this Court's opinion in *United States v. Erie Railroad*, 235 U.S. 513 (1915), for the proposition that section 1694 imposes no agency requirement. *Erie* involved an agreement between the Erie Railroad and the Western Union Telegraph Company that called for "a joint operation of telegraph lines over the right of way of the railroad." *Id.* at 516. The letters in issue were addressed to the railroad's station agent at Montgomery, New York, who was also in charge of the telegraph office, and they were from the "joint superintendent of telegraph." In upholding carriage of the letters, the Court observed that the companies shared facilities and jointly controlled communications equipment, employees, and financial responsibility. The Court stated:

The telegraph is a facility of the railroad company and necessary to its operations, the telegraph company doing what the railroad company did for itself before the agreement and but for the agreement with the telegraph company would have to do. The railroad company has an interest in the receipts of the other company and is concerned in their amount and the maintenance and increase of the telegraph business. The control of the telegraph company's instrumentalities and its officers and operators is in a "competent joint superintendent of telegraph," in whose appointment the railroad company has a voice and whom it also may discharge.

Id. at 520. The Court stated that the railroad was "so far concerned with the telegraph business as to make its efficient and successful operation of interest to it." The "interest" that the railroad had in the operation of the telegraph was an interest in the technical sense—that is, the railroad was a co-venturer who had a direct economic stake in the operation. In stark contrast, the University has no "interest" in the communications between its cus-

todial employees and the union, except perhaps in the broad lay sense that it may have a "curiosity" about them.

In fact, the opinion in *Erie* supports the position of the University concerning the definition of the phrase, "relates to the current business of the carrier." The letters at issue in *Erie* expressly discussed the participation of the railroad in telegraph revenues. A test that relied upon a bare relationship between the content of the letters and the carrier would have rendered unnecessary any examination of the relationship of the parties to the joint venture. The reason that it was necessary to examine that relationship was to ensure that the letters were, in fact, *letters of the carrier*.⁵

C. Letters from the Union to the University's Custodial Employees Do Not Constitute the "Current Business" of the University

PERB seems to argue that even if the letters must actually *constitute* the business of the University, the union's letters satisfy that requirement. In large part, PERB relies (Br. 10, 23) on the proposition that "a state law duty is part of a carrier's current business," a proposition it finds in the 1910 Attorney General's opinion. See 28 Op. Att'y Gen. 537, 539 (1910). However, the only point made in the relevant portion of that opinion was that a railroad's *own reports* to the state, which were mandated by state law, were part of the "current business of the carrier." Thus, the University's own letters relating to collective bargaining are part of its current business whether or not the University wishes

⁵ Two of PERB's arguments are impossible to reconcile. It argues first (Br. 29) that carriage must be by an employee of the carrying institution. However, it also argues (Br. 34) that in *Erie* both the sender and the recipient of the letters were "acting in their capacity as employees of the *telegraph company* when the transmission took place." If the latter assertion is correct, then PERB's purported requirement that carriage be by employees of the carrier was not satisfied and the carriage should not have been permitted.

to engage in collective bargaining. However, there is nothing in the Attorney General's opinion to suggest that the state may define the communications of *others* as the carrier's current business.

PERB's suggestion (Br. 21-22) that the state, may as a matter of state law, define the business of the University as it wishes misses the point, which is the validity, not the construction, of state law. The real issue is whether the state may engage in a sham to avoid federal law. PERB's almost mystical reference (Br. 10) to the "statutory mating of the union and the University" should not be permitted to obscure the relationship between unions and employers and their respective obligations under HEERA. Although it may be possible to imagine a system of labor-management relations where the business of labor is the business of management, that is not the system the legislature created. Rather, it created a system that "was generally modeled after the National Labor Relations Act" (PERB Br. 41), under which the parties "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest."⁶ See *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 488 (1960). Under both HEERA and the NLRA, employees have the right to form, join, and assist employee organizations (or refrain from doing so), Cal. Gov't Code § 3565, 29 U.S.C. § 157, and employers have a duty to bargain with the union, Cal. Gov't Code § 3571(c), 29 U.S.C. § 158(a)(5), and to honor the organizational separateness of the union by refraining from domination, Cal. Gov't Code § 3571(d), 29 U.S.C. § 158(a)(2). With that system as a "given," the question is whether the legislature may by fiat declare that for purposes of the postal laws—and apparently for no

⁶ Because of the parallels between HEERA and the NLRA, if the letters from the union to the University's custodial employees are letters of the University, then letters from the United Auto Workers to employees of General Motors must be letters of General Motors. There is no principled basis for treating the two situations differently under the Private Express Statutes.

other purposes—the business of the union constitutes the business of the University. Principles of federal supremacy require a negative answer to that question.

In its opening brief (at 15, 17), the University argued that letters of the union were not letters of the University, in part because the University could be subject to an unfair practice charge if it attempted to learn the contents of the letters⁷ and because the University cannot control the employee's response. In response, amicus AFSCME suggests that the University's argument lacks merit, because communications of a University psychiatrist are equally confidential and beyond University control, yet they can be carried in the University's mail system. AFSCME's reasoning is wrong on both counts. As to the confidentiality issue, the reasons for confidentiality of the psychiatrist's communications and the union's communications are different. The psychiatrist's communications are confidential with respect to some, but not all, agents of the University to safeguard the privacy rights of the patient. Nonetheless, some agents of the University have access to medical records in order to monitor the performance of the University psychiatrist and ensure that he is providing adequate care. On the other hand, the union's communications are confidential with respect to agents of the University not to safeguard some privacy right of the individual employees, but rather, at least in part, to prevent the University from exercising control over the employees. As to AFSCME's suggestion that the University cannot control the actions of the psychiatrist (or its professors), it is simply wrong. Not only does the University have the "right to control"—which under California law is the *sine qua non* of the employment relationship, *Societa per Azioni de Navigazione Italia v. City of Los Angeles*, 31 Cal.3d 446, 457-58, 183 Cal. Rptr. 51, 57, 645 P.2d 102, 108, cert. denied, 459 U.S. 990 (1982)

⁷ PERB does not disagree with this assertion. (Br. 30-31 n.20).

—it also has a duty to control. As a result, the University may be liable for the acts of an errant psychiatrist, see *Tarasoff v. Regents of the University of California*, 17 Cal.3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976), but it is certainly not liable for the acts of an errant union or for the acts of its employees vis-à-vis the union.

PERB also relies heavily (Br. 25-26) on this Court's opinion in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), arguing that the Court's conclusion that the Perry Education Association's letters related to the "official business" of the school district should inform the Court's definition of the statutory phrase, "current business of the carrier." Other than the happenstance that the phrases "current business of the carrier" and "official business" both contain the word "business," there is no reason a phrase employed in an opinion of the Court addressing a First Amendment issue should be considered coextensive with a different phrase in a postal statute enacted seventy-four years earlier. In determining the meaning of the statutory phrase, the issue is what Congress meant by the phrase in 1909. That intent is to be found in the legislative history of the statute, not in an opinion of this Court that did not mention, much less turn on, the phrase at issue.

In sum, the letters from the union to the University's custodial employees are the current business of the union, and they are the current business of the custodial employees. They are not the current business of the University.

III. CARRIAGE OF THE UNION LETTERS IS NOT BY "PRIVATE HANDS WITHOUT COMPENSATION"

Carriage by the University of union letters is neither by "private hands,"⁸ nor "without compensation." In

⁸ In its opening brief (at 34), the University argued that its mail system could not be considered "private hands" and that the 1909 amendment recognizing the letters-of-the-carrier exception would

arguing that carriage of the union's letters is "without compensation," PERB and appellee Wilson take conflicting views of the relationship between the state, the University, and University employees. However, either view compels the conclusion that the carriage is compensated.

PERB contends (Br. 41) that "HEERA explicitly defines U.C. as the employer here, not the state." PERB then reasons that the separateness of the state and the University precludes a conclusion that carriage of letters may engender the good will of the employees, distinguishing situations where a government agency voluntarily undertakes such an obligation, as in a collective bargaining agreement. Thus, the argument goes, the state stands to gain no employee good will because University employees are not state employees, and the University stands to gain no good will because it is compelled to carry the mail. However, the necessary conclusion of that analysis is that carriage of the letters is involuntary and that it is both ordered and funded by the same third party.⁹

Appellee Wilson, on the other hand, takes the opposite view. He argues (Br. 52) that "the University is part of the state government" and therefore it is "simply a 'per-

have been unnecessary if the already-existing private-hands exception were broad enough to cover railroads (and, presumably, universities). In response, PERB suggests (Br. 39 n.28), relying upon the 1896 Attorney General's opinion, that the phrase "private hands" included everyone but common carriers. The difficulty with that position, however, is that it ascribes an unlikely intent to Congress—that is, that Congress viewed the states as "private" but common carriers as "non-private."

⁹ PERB's assertion (Br. 42) that "[t]he funding of the mail system is granted entirely independently from the PERB order to allow access to the mail system" is incorrect. PERB's order was based upon its conclusion that the legislature, by enacting Cal. Gov't Code § 3568, had required the University to grant unions access to its internal mail system. The legislature is also the source of the major portion of the University's funds. Therefore, the legislature has both ordered and funded the carriage.

son' spending its own funds." However, if the legislature, PERB, and the University are all one entity—"the state"—then the carriage can no longer be viewed as compelled. That is, if the obligation to carry the union letters is simply an obligation of the state voluntarily assumed by the state for the benefit of state employees, this case is governed squarely by the principles that have been applied to voluntarily adopted access policies. The Postal Service has consistently held that such policies constitute a benefit to unions and employees that is part of the consideration for the services of the employees and the good-will of the union. See Brief for the United States 25-27; PES No. 82-9, reprinted at J.S. App. A-66. Consequently, under either analysis the carriage is compensated.

As an alternative position, PERB (Br. 12) and the NEA (Br. 28-29) assert that even if some compensation is involved in a broad sense, the statute covers only "specific" reimbursement. They argue that there is no such reimbursement in this case, because there is no "line-item" in the state budget for the carriage.¹⁰ That is a peculiar suggestion that is inconsistent with almost a century-and-a-half of case law and administrative interpretation.¹¹ In 1846, a federal court rejected the "specific reimbursement" argument by ruling that the Private Ex-

¹⁰ Interestingly, there seems to be unanimity on the part of appellees and their amici that in enacting the letters-of-the-carrier exception, Congress intended that carriers would not be permitted to carry the personal letters of their employees. The importance of this limitation is unclear, however, since according to the logic of their arguments concerning the private-hands-without-compensation exception, the letters could be carried under the latter exception, since there would be no "specific reimbursement."

¹¹ It is also inconsistent with PERB's argument (Br. 39 n.28) that the letters-of-the-carrier exception "was necessary to allow carriage between businesses in an economic relationship," because absent an identifiable connection between the compensation and the carriage, there would have been no "compensation" and the letters-of-the-carrier exception would not have been necessary.

press Statutes "did not authorize the defendant to establish an express for the carrying of letters in connection with, or as part of his business of a merchandise express, *although no charge was made for letters as such.*"¹² *United States v. Thompson*, 28 F. Cas. 97, 98 (No. 16,489) (D. Mass. 1846).

PERB's advocacy of a requirement of an "identifiable connection" between compensation and carriage is a call for an empty formalism that fails to give adequate weight to the revenue-protection purposes of the Private Express Statutes. For example, if the parties recite in a collective bargaining agreement that the union is forgoing a ten-cent raise in exchange for the employer's agreement to carry the union's letters in its mail system, then presumably PERB would agree that compensation exists. However, if the parties negotiated the same total "package" without the above recitation, PERB would say that there is no compensation. Yet the economic reality is identical, and the diversion of Postal Service revenues is just as real.

¹² Amicus AFSCME argues (Br. 17) that a conclusion that the carriage in this case is compensated would mean that all private carriage is precluded because all institutions and individuals are somehow funded by third parties. However, here the source of the funds is also the source of the command to deliver. When a state orders that an act be performed and provides the resources with which to perform it, the performance is "compensated" for purposes of the Private Express Statutes. Otherwise, as we have noted (Br. 38-39), a state could establish a complete mail system for delivery of citizens' mail, support it with the general revenues of the state, and displace entirely the United States Postal Service, all consistent with the private-hands-without-compensation exception.

Moreover, whether additional funds have been appropriated by the legislature for the carriage is of no consequence. Even if they had not, the University would be required to spend a certain portion of the funds provided by the legislature on carrying union letters, leaving it less to spend for other purposes. The result is no different from a "line item" for the cost of carriage with a corresponding decrease in other "line items."

PERB provides no argument based upon logic or policy to ignore the considered judgment of the Postal Service, except that "changes" in interpretation by the agency dissipate any deference to which its interpretation would otherwise be entitled. However, the cases it cites involve instances where an agency has dramatically "changed its course." See, e.g., *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-43 (1976) (refusing to give substantial weight to policy of EEOC in light of prior reversal). In contrast, the Postal Service has *never* taken the position that carriage of letters is permissible under the private-hands-without-compensation exception merely because the carrier was compensated by someone other than the sender of the letters, and it has *never* taken the position that carriage of letters that was both mandated and paid for by the state is permissible. The most that can be said is that the Postal Service's articulated definition of "compensation" has been refined to reach new threats to the congressional policy. As this Court has previously recognized, agencies "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)).

The question then becomes simply whether the Postal Service's conclusions are unreasonable or inconsistent with the statutory mandate. As this Court has observed, "it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981). There is no dispute that the Private Express Statutes were intended to protect the revenues of the Postal Service or that the private-hands-without-compensation exception reflects Congress' determination that "compensated" carriage threatens those

revenues. The Postal Service, in turn, has concluded that in order to implement the congressional mandate it is necessary to include within the definition of "compensation" benefits provided to the carrier that are not "specifically earmarked" and payments not only from the sender but also from others, especially the entity that orders the carriage.

The Postal Service's concern with these other forms of compensation is a rational one. As this Court has recognized in another context, "[t]he economic effect of direct and indirect assistance often is indistinguishable" *Grove City College v. Bell*, 465 U.S. 555, 565 (1984). A dollar paid by a third party for the carriage of letters and a "non-earmarked" dollar that goes to fund the carriage of letters threaten the revenues of the Postal Service to the same extent as a dollar paid by the sender of the letters. It is not relevant whether the source of the funds is the sender of the letters or instead the entity that ordered the carriage, nor is it relevant whether the funds are "earmarked" or come from a general fund. Therefore, the Postal Service's inclusion of all of those situations within the definition of "compensation" is both rational and in furtherance of congressional policy.

In another attempt to engraft limitations on the scope of the Private Express Statutes that Congress has not seen fit to create, PERB argues (Br. 12, 43 n.31) that the Private Express Statutes are limited to "entrepreneurial competitors" who "desire to compete with the Postal Service."¹³ While it is probably true that the principal threat to Postal Service revenues perceived by Congress was from those who would seek a profit at the expense of the Postal Service—since the opportunity to profit supplies the most common incentive to compete with the Postal Service—there is nothing in either the

¹³ It is not clear what PERB means by "entrepreneurial competitors," since it seems to include (Br. 43 n.31) within that category entities carrying mail for which postage is not charged and that is not designed to yield a profit.

statute or the legislative history to suggest that in enacting the private-hands-without-compensation exception Congress intended to permit compensated carriage that was not undertaken for profit. Had Congress so intended, it could easily have said so.

Even if Congress had meant to prohibit only carriage that was intended to divert revenues from the Postal Service, the carriage ordered by PERB would not be permissible. Diversion of Postal Service revenues is not an incidental by-product of the scheme established by the California legislature; rather, it is part and parcel of that scheme. The issue is not, and never has been, whether unions should have access to the University mail system. Instead, the issue is whether union letters must bear postage in order to be carried in that system. Apparently, the California legislature has determined that it wishes to save unions the cost of postage, and it has attempted to transfer the cost to the Postal Service by mandating that the University carry the unions' unstamped letters. Thus, in a very real sense, the legislature was motivated by a desire to deprive the Postal Service of revenues, since each dollar saved by the union would otherwise have gone directly into the coffers of the Postal Service.

There are sound reasons, both in principle and in practice, for not limiting the proscriptions of the Private Express Statutes to profit-making entities or profitable carriage. First, even non-profit carriers are concerned with the cost of carriage, so they are more likely to undertake to carry letters where the costs of carriage are low. Although it may be that the Postal Service would have no objection in principle to the takeover by private parties of unprofitable routes if an acceptable level of service were maintained, there is nothing in the record to suggest that the carriage in issue here was unprofitable. On the contrary, this is the most lucrative kind of service for the Postal Service, since the University

will carry the letters and the Postal Service will receive the postage.

Second, a dollar diverted to (or by) a non-profit enterprise is still a dollar diverted. Despite PERB's suggestion (Br. 16 & n.8) that the carriage at issue here does not threaten "a huge and unusual inroad" or an "unusually massive encroachment" on postal revenues, the level of amicus support indicates that millions of dollars of postal revenues are involved here. Amicus briefs have been filed in support of appellees by organizations having a combined membership of approximately 3.5 million public-sector employees, all claiming that they need access to internal mail systems to communicate effectively with the employees they represent. Furthermore, the statutory arguments advanced by these amici are not limited in principle to public-sector employers, but extend to the private sector as well. The potential therefore exists for a major diversion of Postal Service revenues.

Third, an administrative nightmare would be created if it were necessary to determine on a case-by-case basis whether the carriage would be "profitable." Congress made a sensible determination not to embroil the Postal Service in the thicket of determining whether carriage of a particular letter was profitable or determining whether a carrier was motivated by an "entrepreneurial desire to compete with the Postal Service." Instead, Congress outlawed the compensated carriage of unstamped letters, and the Postal Service regulations are a rational method of implementing that policy.

IV. THE PRIVATE EXPRESS STATUTES DO NOT VIOLATE THE FIRST AMENDMENT

Amicus California Faculty Association argues that if the Private Express Statutes prohibit carriage of unstamped union letters, then they are inconsistent with the First Amendment. It presents two related arguments. Its first argument (Br. 6) is that by enacting California

Gov't Code § 3568, the legislature has created a "limited public forum" that is open to all who wish to communicate on the subject of "harmonious and cooperative labor relations."¹⁴ However, that argument overlooks a threshold question, which is whether—given the existence of the Private Express Statutes—the legislature had the power to declare the University mail system a "public forum" in the first place. Because the Private Express Statutes provide that an institution may carry only its own unstamped mail in its mail system, any attempted "opening of the forum" by the state would be in conflict with federal law and therefore preempted.¹⁵ See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

The CFA's second argument (Br. 11) is that even if the University mail system is a "nonpublic forum," the University's restriction on access is content based. However, the exclusion of all unstamped letters other than those of the University itself is just the kind of content-neutral exclusion that the Court specifically approved in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983). The University limits use of its mail system to communications that are sent by or to the University. The letters of Local 371 were not carried, but neither were letters of employees or organizations opposing the union. As in *Perry*, the University's limitation on access is not based on the content of the letters, but on the status of the persons who send or receive them. If the access policy examined by the Court in *Perry* was constitutional, then *a fortiori* the Univer-

¹⁴ Under this argument, the obligation of the University would not be limited to the union letters at issue here, but would also extend to carriage of letters of anyone else who wished to expound on labor relations matters.

¹⁵ The CFA's argument assumes that the University is correct in its interpretation of the Private Express Statutes, since its constitutional analysis is unnecessary if the University is wrong on its statutory argument.

sity's access policy is constitutional, because it does not distinguish among third-party communicators.¹⁶

The only argument that the CFA can muster concerning the lack of viewpoint neutrality is that because the University uses its mail system to express its own views about labor relations, unions are entitled to use the system to express their views. However, the CFA cites not a single case standing for the proposition that the government's own use of its property for communicative purposes creates a right of access to anyone else wishing to communicate on the same subjects. In fact, the Court in *Perry* acknowledged that it would have been permissible for the school district "to close the mail system to all outsiders for the purpose of discussing labor matters while permitting such discussion by administrators and teachers." 460 U.S. at 50 n.9. See also *id.* at 61 n.5 (Brennan, J., dissenting) ("a government may . . . close a nonpublic forum altogether or limit access to the

¹⁶ It should be noted that PERB has misrepresented certain portions of the record. Although it is not clear what significance PERB attaches to its assertion, it states (Br. 3) that prior to 1979, AFSCME and other unions were allowed access to the University's internal mail system. It then cites to a page in the record consisting of oral argument of University counsel in support of a jurisdictional statute-of-limitations defense: "[I]nsofar as there was a practice of delivery of union literature via supervisors . . . this practice was changed prior to July 1st [1979]." R. 266 (emphasis added). The record demonstrates that University policy prohibiting use of its mail system by all employee organizations (and other groups, R. 214, 317-350) has been known to AFSCME for at least 20 years. R. 271-275, 379; J.S. App. A-82. With the exception of a five-month period when AFSCME used a portion of the mail system because a newly transferred manager was unfamiliar with the rules governing the system, University policy has been consistently applied. R. 248-49, 260-63, 268, 277-78, 385; J.S. App. A-82 to A-83.

At bottom, however, the issue of the University's prior compliance *vel non* with federal postal laws is not material to the issues of statutory construction before the Court, unless PERB is arguing that the University is currently excused from complying with federal law because it has violated it in the past.

forum to those involved in the 'official business' of the agency").

Further demonstrating that the University's access policy is not "in fact based on the desire to suppress a particular point of view," see *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 812 (1985), is the fact that the University's exclusionary policy is mandated by federal law. The University did not unilaterally decide to require non-University speakers to stamp their letters as a pretext to prevent dissemination of pro-union materials. Rather, the record is clear that the University's regulations were adopted to comply with postal statutes and regulations. As a matter of federal law, the University may not deliver unstamped union letters regardless of whether it desires to do so. A more compelling reason not to deliver such letters can hardly be imagined.

CONCLUSION

The judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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3508

QUESTION PRESENTED

Whether the delivery by a university of unstamped mail from a labor union to university employees violates the Private Express Statutes.

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BRIEF FOR THE UNITED STATES
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INTEREST OF THE UNITED STATES

The Private Express Statutes grant the United States Postal Service a monopoly on the carriage of letters. The long-standing postal monopoly protects the Postal Service's ability to serve all parts of the country efficiently and at low cost by preventing private carriers from competing selectively with the Postal Service on its most profitable routes. The Private Express Statutes contain limited exceptions, including an exception that permits an organization to carry such letters "as relate * * * to the current business of the carrier" (18 U.S.C. 1694). The court below concluded, contrary to a Postal Service advisory opinion, that this exception permits a university to deliver through its internal mail system un-

stamped letters from a labor union to the university's custodial employees.

The United States has an interest in this case for two reasons. First, the outcome depends on the correctness of the interpretation accorded to the Private Express Statutes by the United States Postal Service, the agency charged by Congress with those statutes' implementation. Second, the effect of the decision below, if adopted nationwide, would be to diminish substantially the scope of the postal monopoly, resulting in increased cost to the public or a less efficient postal system. At this Court's invitation, the United States previously filed a brief in this case urging that the Court note probable jurisdiction and reverse the judgment below.

STATEMENT

1. In 1979 the American Federation of State, County, and Municipal Employees (the Union), one of the two appellees, filed an unfair labor practice charge against appellant, the Regents of the University of California. The gravamen of this charge was that the University of California at Berkeley had refused to permit the Union to use the internal campus mail system to send unstamped Union letters to the University's custodial employees at their places of work (J.S. App. A2). The Union contended that this refusal to deliver its letters violated its right of access to the employer's "means of communication" under the California Higher Education Employer-Employee Relations Act, Cal. Gov't Code §§ 3568, 3571 (West 1980) (*reprinted in J.S. App. A115*).

The University declined to deliver the Union's letters because it believed that such delivery would violate the Private Express Statutes (18 U.S.C. 1693-1699; 39 U.S.C. 601-606). These statutes generally

prohibit the carriage of letters over post routes without payment of the postage that would be required if the letters were carried by the United States Postal Service.¹ In operating its internal system for delivery of unstamped campus mail, the University relies on a statutory exception to the Private Express Statutes for so-called "letters of the carrier" (18 U.S.C. 1694, 39 C.F.R. 310.3(b) (*reprinted in J.S. App. A100, A110*)), supplemented by a regulatory suspension of those statutes' operation "for certain letters of college and university organizations" (39 C.F.R. 320.4 (*reprinted in J.S. App. A114*)).² The Postal Service, however, informed the University in an advisory opinion (see 39 C.F.R. 310.6) that neither the letters-of-the-carrier exception nor the suspension for letters of university organizations would permit the University to deliver unstamped mail from the Union to custodial employees.

In its advisory opinion (J.S. App. A66-A75), the Postal Service explained that the letters-of-the-carrier exception "permits an employer to deliver his own letters on his own current business." This exception would authorize delivery of unstamped employee mail, the Postal Service advised, only if such letters were "sent by or addressed to members of the staff or faculty in their official capacity as repre-

¹ It is undisputed that the University delivers mail over post routes. See J.S. App. A26-A27. The Postal Service delivers mail to approximately 50 locations on the Berkeley campus, and the University's internal mail system delivers mail to those same 50 locations, plus an additional 100 locations. *Ibid.*

² The Postal Service is authorized by 39 U.S.C. 601(b) to suspend the operation of the Private Express Statutes "where the public interest requires the suspension."

sentatives of the employer University." *Id.* at A72, A73. The opinion cited prior Postal Service opinions which had concluded that a school board's carriage of letters from a labor union to school district employees would not qualify for the letters-of-the-carrier exception. This conclusion was based on the fact that union letters to employees "can in no sense be regarded as sent by or addressed to the carrier-District," and that such letters in any event "do not relate to the current business of the school board (the carrier), but, rather, to the current business of the unions with which the board deals" (*id.* at A73). The Postal Service similarly concluded that the letters-of-the-carrier exception would not cover the University's delivery of the Union's mail here (*id.* at A74).

The Postal Service's opinion further advised that the regulatory suspension for college and university organizations was likewise unavailable (J.S. App. A74-A75). "Th[at] suspension," the Postal Service explained, "was intended to cover the letters of student and faculty organizations which serve the campus community but which technically are not a part of the university itself, and, therefore, are not eligible" for the letters-of-the-carrier exception (*id.* at A74). The Postal Service concluded that a labor union seeking to represent a University's custodial workers "is neither a student nor a faculty organization" (*id.* at A75).

Finally, the opinion letter advised that the statutory exception for carriage by "private hands without compensation" (18 U.S.C. 1696(c), 39 C.F.R. 310.3(c) (*reprinted in* J.S. App. A101, A110)) could not be construed to apply. Since the Union and the University dealt with each other at arm's length, the Postal Service concluded that "the carriage con-

templated here is in no sense a gratuitous act" (J.S. App. A72).

2. In response to the University's refusal to deliver its unstamped mail, the Union filed an unfair labor practice charge with the California Public Employment Relations Board, also an appellee here. The Board ruled that the University must permit the Union to use the campus mail system without payment of postage, notwithstanding the Postal Service's advisory opinion (J.S. App. A14-A47). The Board first concluded that Section 3568 of the California Government Code requires state universities to provide access to their internal mail systems free of charge to unions representing or seeking to represent university employees (J.S. App. A18-A20). The Board then held that the University had no reasonable basis for denying such access, rejecting its argument "that federal postal statutes and regulations prohibit it from carrying unstamped [union] materials" (*id.* at A25). The Board asserted that the Postal Service had given the letters-of-the-carrier exception too narrow a reading (*id.* at A38), stating that the exception should apply whenever a letter concerns the "business" of the carrier, a term that the Board construed broadly to include any matters affecting the University's labor relations (*id.* at A38-A39). The Board alternatively ruled that the "private hands without compensation" exception to the Private Express Statutes would authorize the carriage here (*id.* at A27-A36). It also concluded that the regulatory suspension for letters of student and faculty organizations would be constitutionally suspect if it were not construed to authorize the same result (*id.* at A42-A43).³

³ It appears that the Board, having concluded that California law required the University to deliver the Union's unstamped

The California court of appeal affirmed the Board's order, rejecting the University's argument that the carriage in question "is prohibited by the Private Express Statutes," and holding "that no conflict exists between the [California statute] and federal postal regulations" (J.S. App. A4, A7). The court accepted the Board's conclusion (see *id.* at A6) that California Government Code Section 3568 required the University to deliver the Union's mail free of charge. The court then held that such carriage was authorized by the letters-of-the-carrier exception; it therefore found no need to address the alternative grounds on which the Board had based its decision (*id.* at A6-A7). Ignoring the Postal Service's opinion that the letters-of-the-carrier exception applies only to letters sent by or addressed to employees in their capacity as representatives or agents of the employer, the court deemed it sufficient that a letter be sent to the employee "in his or her capacity as an employee" and that it relate to the "current business" of the employer-carrier (J.S. App. A8-A9). The court then held that the Union's letters to University employees related to the "current business of the carrier" as that term is defined in 18 U.S.C. 1694, reasoning

mail, was compelled to conclude that federal law did not bar that outcome. The court of appeal had previously instructed the Board that, under the California Constitution, it lacked power to declare a state statute unenforceable on federal grounds (J.S. App. A16 & n.2). The court explained that, under a recent constitutional amendment adopted by the California electorate, state agencies are prohibited from deciding that a state statute is unenforceable by reason of preemptive federal law (*id.* at A63). The court of appeal had nonetheless instructed the Board that it remained free to consult and interpret the relevant federal postal provisions (*id.* at A64).

that California law aims to foster "harmonious labor relations" between state universities and their workers (J.S. App. A10-A11).

The California Supreme Court denied the University's petition for review, Justice Lucas dissenting (J.S. App. A13).

SUMMARY OF ARGUMENT

The Private Express Statutes establish the long-standing postal monopoly. Since Congress has determined that the Postal Service should serve all parts of the country and that the cost of mailing a first-class letter should not vary depending on how far the letter must travel, the postal monopoly is necessary to prevent other carriers from selectively competing with the Postal Service on its most profitable routes. If other carriers could "skim the cream" by competing with the Postal Service only in urban areas, postal revenues would decrease and the cost of sending letters through the Postal Service would most likely rise. While Congress has authorized exceptions from the reach of the Private Express Statutes, and the Postal Service has suspended their operation in a limited number of circumstances, broad interpretations of those exceptions and suspensions could significantly reduce postal revenues. The decisions below would authorize carriage of a large number of letters outside the mails, thus eroding the postal monopoly substantially.

The "letters of the carrier" exception does not authorize carriage by the University of the Union's letters. The Postal Service, following a construction of the Private Express Statutes by the Attorney General that Congress endorsed in 1909, has long construed the statutes to authorize private carriage of letters to employees of the carrier only when those

letters are sent to employees acting in a representative capacity. Since 1912 the Postal Service has consistently held that letters to employees from unions and similar employee organizations are not within the scope of the exception. That construction is reasonable, since letters relating "to the current business of the carrier" (18 U.S.C. 1694) would normally be sent to employees acting as agents of the carrier, and employees receiving routine union correspondence are not acting in a representative capacity. The Postal Service's construction also advances the revenue-protecting purpose of the statutes. It is accordingly entitled to deference.

Neither the "private hands without compensation" exception nor the suspension for "college and university organizations" authorizes the carriage here. The Postal Service, in line with court decisions and Attorney General opinions construing the private-hands-without-compensation exception, has consistently held that non-monetary compensation is implicit in arrangements whereby a party to a business relationship carries letters for another party to the business relationship. In addition, the Postal Service has concluded that Congress intended the exception to cover only gratuitous carriage. The Postal Service reasonably determined that compensation is involved in this case, where the State has ordered its instrumentality to carry letters for a union that seeks to represent state employees and where the carriage is in no sense gratuitous. The Postal Service's conclusion that the suspension for college and university organizations does not extend to a custodians' union is clearly correct, and respondent's suggestion that it conflicts with the Equal Protection Clause is without merit.

ARGUMENT

CARRIAGE IN A UNIVERSITY'S INTERNAL MAIL SYSTEM OF UNSTAMPED MAIL FROM A LABOR UNION TO UNIVERSITY CUSTODIAL EMPLOYEES VIOLATES THE PRIVATE EXPRESS STATUTES

A. The Private Express Statutes Generally Bar The Carriage Of Letters By Parties Other Than The Postal Service In Order To Protect Postal Service Revenues

1. Congress enacted the Private Express Statutes pursuant to its constitutional authority to establish "Post Offices and post Roads" (U.S. Const. Art. I, § 8, Cl. 7). The "postal monopoly" created by these statutes is of long standing. See *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 122 (1981). Congress in 1792 enacted its first postal law, which prohibited the private carriage of "any letter or letters, packet or packets, other than newspapers, for hire or reward." Act of Feb. 20, 1792, ch. 7, § 14, 1 Stat. 236.⁴ The Postal Act of 1845

⁴ The 1792 Postal Act continued the postal monopoly that had been established under the Articles of Confederation. See Act of Oct. 18, 1782, 23 J. Continental Cong. 672-673; Craig & Alvis, *The Postal Monopoly: Two Hundred Years of Covering Commercial as Well as Personal Messages*, 12 U.S.F. L. Rev. 57, 70-71 (1977). Postal monopolies were well established in England and in Europe by the late Eighteenth Century. Johnston, *The United States Postal Monopoly*, 23 Bus. Law. 379, 380 (1968); see *United States Postal Service v. Brennan*, 574 F.2d 712, 714-715 (2d Cir. 1978), cert. denied, 439 U.S. 1115 (1979). A recent survey of 10 developed nations indicated that the government had a legal monopoly on postal communications in all 10 countries. Board of Governors of the Postal Service, *Statutes Restricting Private Carriage of Mail and Their Administration*, H.R. Doc. 5, 93d Cong., 1st Sess. 63-68 (Comm. Print 1973) [hereinafter 1973 *Postal Service Report*]. Thus, although it is possible to imagine a world without postal monopolies (see U.S. Dep't of

put "the private express statutes in essentially the form in which they remain today." Johnston, *The United States Postal Monopoly*, 23 Bus. Law. 379, 386 (1968). See *The Post-Office Monopoly*, 1 Monthly L. Rep. 385, 390-392 (1849). The 1845 enactment prohibited the establishment of any "private express," although it provided that "nothing in this act contained shall be construed to prohibit the conveyance or transmission of letters * * * by private hands, no compensation being tendered." Act of Mar. 3, 1845, ch. 43, §§ 9, 11, 5 Stat. 735-736. The postal monopoly extends only to the carriage of letters, and does not cover the delivery of packages. *1973 Postal Service Report* 6.⁵

Justice, *Changing the Private Express Laws: Competitive Alternatives and the U.S. Postal Service*, U.S. Gov't Doc. No. 027-000-00476-8, at 24-28 (1977)), postal monopolies have long been the near-universal rule, at least in developed countries.

⁵ As noted above (note 2, *supra*), the Postal Service is authorized to suspend the operation of the Private Express Statutes "where the public interest requires the suspension" (39 U.S.C. 601(b)). One such suspension, covering letters of student and faculty organizations (39 C.F.R. 320.4), is involved in this case. In 1979, the Postal Service promulgated a distinct suspension for "extremely urgent letters" (39 C.F.R. 320.6), which covers the operations of the privately-operated same-day and overnight delivery services. The latter suspension was enacted in response to congressional concern that the Postal Service was not adequately serving the needs of businesses with time-sensitive materials. See *Private Express Statutes: Hearings Before the Subcomm. on Postal Operations and Services of the House Comm. on the Post Office and Civil Service*, 96th Cong., 1st Sess. 21-22 (statements of Chairman Wilson), 333-334 (statements of Postmaster General Bolger) (1979).

In addition to the two statutory exceptions at issue in this case—the exceptions for "letters of the carrier" and for letters

The Private Express Statutes are designed to facilitate the nationwide delivery of mail by protecting the Postal Service's monopoly on the carriage of letters, and hence the revenues of the Postal Service. See *Ex parte Jackson*, 96 U.S. 727, 735 (1878); *United States v. Bromley*, 53 U.S. (12 How.) 88, 96-97 (1851); *United States Postal Service v. Brennan*, 574 F.2d 712, 713-715 (2d Cir. 1978), cert. denied, 439 U.S. 1115 (1979). Congress has instructed the Postal Service to "provide prompt, reliable, and efficient services to patrons in *all* areas and [to] render postal services to *all* communities." 39 U.S.C. 101(a) (emphasis added). Moreover, "the United States has had, since 1863, a basic postage rate for letter mail that has not varied with the distance traveled." *1973 Postal Service Report* 4. That policy is continued in the current postal laws, which provide that "[t]he rate for each such class [of mail] shall be uniform throughout the United States, its territories, and possessions." 39 U.S.C. 3623(d). Thus, it costs the same amount (currently 22¢) to send a first-class letter from Maine to California that it costs to send the same letter from Capitol Hill to Georgetown.

The Private Express Statutes prevent private carriers from competing selectively with the Postal Service on its most profitable routes. In the absence of these statutes, private carriers could "skim the cream" from the Postal Service's revenues by serving only selected areas, such as cities and other high-

carried by "private hands without compensation"—Congress has excepted from the reach of the Private Express Statutes letters accompanying cargo (39 U.S.C. 602(a)(2), 39 C.F.R. 310.3(a)), letters carried by special messenger (18 U.S.C. 1696(c), 39 C.F.R. 310.3(d)), and letters carried to a post office (18 U.S.C. 1696(a), 39 C.F.R. 310.3(e)).

density regions; under the scheme established by Congress, these high-density regions subsidize mail deliveries to and from rural areas and between distant points, thus permitting a single postage rate to be charged nationwide. See *1973 Postal Service Report* 113-117. If competitors were permitted "to serve the low-cost segment of the market, leaving the [Postal Service] to handle the high-cost services * * * the [Postal Service] would lose lucrative portions of its business, increasing its average unit cost and requiring higher prices to all users." Report of President's Comm'n on Postal Organization, *Towards Postal Excellence* 129 (1968). Thus, as the Second Circuit has stated in concluding that the Private Express Statutes are constitutional, "[t]he monopoly which Congress created is an appropriate and plainly adapted means of providing postal service beneficial to the citizenry at large" (*Brennan*, 574 F.2d at 716).

2. It is undisputed that, in the absence of an applicable exception or suspension, the carriage of letters sought by appellees here is prohibited by the Private Express Statutes.⁶ It is also clear that the type of carriage at issue here—carriage by an employer of third-party mail addressed to its employees—is covered, not only by the letter, but also by the spirit and the purpose, of the statutory prohibition.

⁶ Certain sections of the Private Express Statutes speak in terms of *private* carriage of letters, which conceivably could be thought to suggest that carriage by public entities, such as the state University here, would be permissible. The Private Express Statutes, however, broadly prohibit carriage "out of the mails" (39 U.S.C. 601(a)). Those statutes, obviously, have never been understood to permit the States to set up their own mail services in competition with the federal Postal Service, and appellees make no contention to the contrary.

The use of internal mail systems to send letters to employees could divert a substantial portion of mail from the Postal Service, and it thus could seriously erode the postal monopoly that Congress has established.

A number of organizations, from insurance companies to used car dealers, would find it desirable to contact employees of large universities and corporations, all of whom generally may be reached through internal mail services that move over post routes. The marginal cost to an employer of delivering such letters through its internal mail system would typically be lower than the average cost to the Postal Service of delivering them. In the absence of the Private Express Statutes, therefore, employers would have a rational incentive to carry letters from outside organizations to employees, either for cash consideration or in exchange for more indirect benefits. In the case of an organization with an ongoing relationship with an employer, such as a union or a supplier, such indirect benefits to the carrier might take the form of concessions in the context of the ongoing business relationship.

The effect on Postal Service revenues of permitting such carriage would most likely be significant. As the University observes (J.S. 21), the record here shows that one union at one campus spent two to three thousand dollars per year on postage for correspondence sent to one group of University employees. There are many unions, many campuses, and many thousands of employees in the University of California alone. While Postal Service operating revenues are substantial, amounting in 1986 to approximately \$30 billion (Postmaster General Ann. Rep. at 26-28 (1986)), it is in the nature of the Postal Service's business that its revenues are de-

rived from millions of individual transactions that occur in the course of a year. The application of the Private Express Statutes to particular *types* of transactions is therefore very important, because the cumulative effect nationwide of an erroneous application of the statutes to recurring transactions can severely deplete postal revenues. See *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. at 135 (Brennan, J., concurring in the judgment).⁷

B. The Letters-Of-The-Carrier Exception Does Not Authorize The University To Deliver The Union's Letters To University Employees

1. The foundation for the letters-of-the-carrier exception is 18 U.S.C. 1694 (*reprinted in* J.S. App. A100). That section prohibits the private carriage of letters over post routes with a number of exclusions, including an exception for such letters "as relate * * * to the current business of the carrier."⁸

⁷ Enforcement of the Private Express Statutes works no serious hardship on universities or other large employers. If an employer determined that its relations with a union representing its employees would be improved by giving the union access to its internal mail system, the employer could agree to provide such access and to pay the postage due on the letters in question (see 39 U.S.C. 601(a) (*reprinted in* J.S. App. A102)). Such an employer cannot, however, divert routine union letters from the mails, driving up the average cost to the Postal Service of delivering mail nationwide.

⁸ Although the exception for letters relating to the "current business of the carrier" appears only in Section 1694—and not, for example, in 18 U.S.C. 1696, which also prohibits private carriage of letters, or 39 U.S.C. 601(a), which broadly prohibits the carriage of letters except through the mails—it has always been understood that the exception for letters relating to the current business of the carrier is a general exception from the Private Express Statutes rather than one limited to Section 1694.

That language was introduced into Rev. Stat. § 3985 (2d ed. 1878), the predecessor of Section 1694, in 1909, and was based upon an 1896 opinion of the Attorney General. In that opinion, the Attorney General concluded that Congress in enacting the Private Express Statutes had not intended to bar common carriers from transporting their own letters, even though the language of Rev. Stat. § 3985 did not explicitly so provide. The Attorney General had emphasized that the implied exception was a narrow one: "The right is to carry letters written and sent by the officers and agents of the railroad company which carries and delivers them, about its business, and these only." 21 Op. Att'y Gen. 394, 399 (1896).

The Attorney General's 1896 opinion provoked controversy in Congress. Most Congressmen praised the good sense of the result reached by Attorney General Harmon, pointing out that a carrier "ought to have the right to send any communication which relates to the current daily operation and maintenance of the road," as where a railroad must communicate speedily with its employees in "the case of a wrecked train" (42 Cong. Rec. 1904 (1908) (Sen. Bacon); *ibid.* at 1904 (Sen. Sutherland)). Senator Bacon, however, found the Attorney General's result difficult to square with the literal language of the then-existing statute. He accordingly proposed that the statute be revised so as "to express in exact language what the Attorney-General says it means," *viz.*, that "the purpose of the law was to prevent common carriers [from] carrying mail matters for others," and that its purpose was not to prevent them from carrying their own letters relating to their own business operations (*id.* at 1905).

It was initially proposed that the desired clarification be effected by amending the statute to prohibit carriage of letters "for compensation" (42 Cong. Rec.

1905 (1908) (Sen. McLaurin); see *id.* at 1903 (Sen. Heyburn)). This suggestion was opposed, however, as being too liberal, on the ground that it might be construed to allow railroads to carry each other's letters free of charge (*id.* at 1905 (Sen. Sutherland); *id.* at 1904 (Sen. Bacon)). Such a result, Senator Sutherland stated, "would make * * * very serious inroads on the revenues of the [Post Office] Department" (*id.* at 1905).

Senator Sutherland instead proposed that the statute be revised to prohibit private carriage of letters, except such letters as relate "to the current business of the carrier" (42 Cong. Rec. 1976 (1908)). This amendment, which drew on language previously proposed by Senator Bacon (*id.* at 1904-1905), was agreed to by the Senate (*id.* at 1976), and was incorporated in the statute as enacted. Act of Mar. 4, 1909, ch. 321, § 184, 35 Stat. 1124. In proposing this amendment, Senator Sutherland stated (42 Cong. Rec. 1976 (1908)):

I move that amendment because I think that it puts in express language precisely what the section means as it stands without it. * * * I think the opinion of the Attorney-General * * * gives the correct construction to this section. The section is dealing with the carrying of mail for others. It is not dealing with the question of the carrying of the mail of the carrier itself.

Senator Sutherland emphasized that his amendment should be narrowly construed to cover only those letters relating directly to the management and conduct of the carrier's business. "I think it should be clear under the law," he stated, "that the carrier should not have the right to carry mail intended for others, but only its own mail" (*ibid.*). The House Report similarly stated that the amendment put the

statute "in exact conformity with the construction placed upon existing law," citing the Attorney General's 1896 opinion (43 Cong. Rec. 3790 (1909)).

In 1910 the question arose whether, under the statute as amended in 1909, a railroad could carry letters from agents of a railroad association, of which it was a member, to other members of the same association. The Attorney General determined that such carriage would violate the Private Express Statutes. 28 Op. Att'y Gen. 537 (1910). He explained (*id.* at 541):

[T]he purpose of Congress in introducing this clause [authorizing carriage of letters relating to the current business of the carrier] was to permit a carrier to transport free outside the mails its own messages within the terms of the opinion of Attorney-General Harmon, and it was not the intention of Congress to revolutionize the then existing law and practice by permitting free transportation of letters and packets belonging to railroads or persons other than the carrier even though such letters or packets might "relate to the current business of the carrier."

The Attorney General acknowledged that the language of the 1909 amendment might be thought to support a contrary result, but he added that "considerations of syntax and grammar must yield to the intention of Congress" (*id.* at 542).

In 1912, the Attorney General again addressed the letters-of-the-carrier exception in a case similar to the instant case. The Postmaster General had inquired whether the Erie Railroad Company could deliver letters addressed to its workers from the Erie Employees Relief Association, an independent organization composed of railroad employees that managed

the railroad's pension fund. See 29 Op. Att'y Gen. 418 (1912) (*reprinted in* J.S. App. A116-A118). Addressing the exception now contained in Section 1694, the Attorney General concluded that "Congress has imposed two conditions upon the free transportation of letters outside the mail: First, that the letters should be the letters of the carrier itself; and second, that they should relate to its own current business. The concurrence of both these conditions is essential to the privilege" (29 Op. Att'y Gen. at 419; J.S. App. A116-A117). Turning to the facts of the *Erie* case, the Attorney General opined that the 1909 amendment would permit the railroad to deliver letters sent "by the association to the railroad company (or its officers and employees as representing the railroad company) concerning relations between the railroad company and the association" (J.S. App. A117). The Attorney General concluded, however, that the exception did not extend to routine correspondence from the Association to railroad employees. "[I]t is not material," the Attorney General stated, "that the purpose of the association and the subject of its communications is a pension system for the carrier's employees, and so a matter of interest to it, for the law excepts only the communications of the carrier itself" (29 Op. Att'y Gen. at 419; J.S. App. A117).

The Postal Service has consistently adhered to that interpretation of the exception. Prior to the issuance of formal regulations concerning the Private Express Statutes in 1974, the Postal Service had periodically published pamphlets describing those statutes' operation. The 1952 edition stated that Section 1694 excepted only "letters written by or addressed to officers or employees of the carrier on the business of the carrier; that is, sent by or addressed to officers of the carrier in their capacities as such officers or employ-

ees." United States Post Office Dep't, *Restrictions on Transportation of Letters* 16-17 (4th ed. 1952). Citing the 1912 Opinion of the Attorney General, the Postal Service pamphlet stated that "letters forwarded on union business * * * would not be within this exemption even though the senders and the addressees are also employees of the carrier" (*id.* at 17).

The regulations issued in 1974 follow this longstanding interpretation of Section 1694. The regulation defining the scope of the letters-of-the-carrier exception provides (39 C.F.R. 310.3(b) (*reprinted in* J.S. App. A110)):

The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the individual actually carrying the letters is not the person sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person (see § 310.3(b)(2)) and the letters must relate to the current business of such person.

As construed by the Postal Service, the exception thus imposes the dual requirement that the letters be letters "of the carrier" and that those letters relate "to the current business of the carrier." In a series of advisory opinions rendered in 1976, the Postal Service accordingly ruled that letters from labor unions to school district employees, carried by school districts in their internal mail systems, do not qualify as "letters of the carrier." See J.S. App. A73-A74.

2. In the instant case, as in the 1912 case analyzed by the Attorney General and the more recent school district cases, the letters-of-the-carrier exception does not apply. As the Postal Service explained in its advisory opinion, letters from the Union to the

University's custodial employees are not "letters of the carrier" because they are neither sent by nor addressed to the University that is being asked to carry them. Rather, the letters are addressed to the University's employees, and such letters could qualify as "letters of the carrier" only if they were being sent to "members of the staff or faculty in their official capacity as representatives of the employer University" (J.S. App. A73). But it cannot plausibly be contended that workers receiving routine Union correspondence are acting as "official representatives" of the University. To the contrary, it would be more accurate to describe such workers as acting, like the Union itself, in an arm's-length (if not an adversarial) relationship with the University. As the University observes in its jurisdictional statement (at 15), it could be subjected to an unfair labor practice charge under Cal. Gov't Code § 3571(d) (West 1980) if it attempted to learn the contents of the union letters at issue here. We agree that "a letter the contents of which are protected from disclosure to the University" cannot be deemed to be a letter "of the University" (J.S. 15).

Moreover, the letters here do not relate to "the current business of the carrier" (18 U.S.C. 1694) as that term has been construed by the Attorney General and the Postal Service. Any letter concerning union business, obviously, would usually be of some interest to the employer, and would at least pique the employer's curiosity. The Postal Service, however, has reasonably construed the statutory exception to mean that letters relate to the employer's "current business" only if they are sent to employees in their official capacity as the employer's representatives (J.S. App. A73). Thus, a letter sent by a union to a corporate officer proposing the commencement of

collective bargaining negotiations, or a letter sent to a corporate personnel official concerning the handling of a grievance, would relate to the "current business" of the employer in the sense that each letter would be addressed to a person who could take official responsive action on the employer's behalf.

This construction of the statute is strongly supported by its legislative history. Congress intended the phrase "current business," as distinguished from the term "business" in general, to be a narrow one. Senator Bacon, for example, responded to a proposal that the statute be revised to permit carriage relating "to the business of the carrier" by stating (42 Cong. Rec. 1905 (1908)):

I am willing to have the Senator make it even narrower than that, and say the "current" business, in order that it might not relate to [the carrier's] financial transactions or anything of that kind, but to current business and operation.

Congress thus regarded a carrier's "current business" as synonymous with "the management of or the conduct of the line" (42 Cong. Rec. 1976 (1908) (Sen. Fulton)), or the "daily operation and maintenance of the road" (*id.* at 1904 (Sen. Bacon)). Congress intended, in short, that "current business" should be narrowly construed to mean concrete matters susceptible of immediate action by the employer's representatives. The term thus cannot properly be interpreted, as it was interpreted by the court below, to embrace amorphous and long-range goals like the fostering of "harmonious labor relations."⁹

⁹ Contrary to the court of appeal's statement (J.S. App. A9-A11), this Court's decisions in *United States v. Erie R.R.*, 235 U.S. 513 (1915), and *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), do not support its conclusion that the current business of the University

A narrow interpretation of the term "current business of the carrier" is obviously necessary lest compliance with the Private Express Statutes become optional on the part of the States and private parties. If States can define "harmonious labor relations" as the "current business" of a regulated employer, there is no clear limit on a State's ability to authorize its instrumentalities and private parties to deliver unstamped mail over federal postal routes. Even delivery of indisputably personal letters might be justified under that approach, since an employer by performing such a service for its employees would surely foster good relations with them. Such an expansive construction of the letters-of-the-carrier exception would result in widespread encroachment on the postal monopoly and a significant depletion of Postal Service revenues, in defiance of Congress's clearly expressed intent.

Finally, in concluding that the term "current business of the carrier" should be read broadly to include anything having to do with labor relations, the court of appeal erred in consulting state law to determine the meaning of words used in a federal statute. The court instead should have deferred to the interpreta-

includes the business of the Union for purposes of 18 U.S.C. 1694. The mail at issue in *Erie R.R.* involved a joint enterprise operated by a railroad and a telegraph company, and the Court held that the "business" of the railroad included the business of the joint enterprise (see 235 U.S. at 516-517). That case sheds no light on how the term "current business of the carrier" should be construed where, as here, two organizations are in an arm's-length or adversarial relationship. In *Perry Education Ass'n*, the Court expressly declined to reach the question presented here (460 U.S. at 39 n.1), and did not consider the meaning of "current business of the carrier" in Section 1694.

tion of the statute put forth by the Postal Service. "It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute." *Clarke v. Securities Indus. Ass'n*, No. 85-971 (Jan. 14, 1987), slip op. 14, quoting *Investment Co. Institute v. Camp*, 401 U.S. 617, 626-627 (1971). "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Young v. Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 6, quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Since the Postal Service administers the Private Express Statutes,¹⁰ its reasonable interpretation of those statutes should be followed. Indeed, the Postal Service's interpretation of Section 1694 is a compendium of those attributes which make an agency's construction most deserving of deference: it is a long-standing interpretation that was formulated contemporaneously with the congressional enactment, it has been consistently applied, and it promotes the statutory purposes. See 5 K. Davis, *Administrative Law Treatise* § 29:16 (2d ed. 1984).

¹⁰ Congress has directed the Postal Service "to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title" (39 U.S.C. 401(2)). In *Associated Third Class Mail Users v. United States Postal Service*, 600 F.2d 824, 826 n.5 (D.C. Cir.), cert. denied, 444 U.S. 837 (1979), the court properly concluded that the Postal Service's authority to promulgate regulations implementing the Private Express Statutes extends to those provisions now codified in Title 18 of the United States Code (§§ 1693-1699) as well as to those provisions codified in Title 39 (§§ 601-606).

C. Neither The Exception For "Private Hands Without Compensation" Nor The Suspension For "College And University Organizations" Authorizes The Carriage At Issue

1. a. Congress has set forth in 18 U.S.C. 1696(c) another exception to the bar against private carriage of mail, providing that the Private Express Statutes do not prohibit "the conveyance or transmission of letters or packets by private hands without compensation." That exception, which is derived from the 1845 Postal Act, was construed almost immediately to be limited to the narrow situation in which no consideration whatsoever—whether monetary or non-monetary, explicit or implied—is furnished in exchange for the carriage. Thus, in 1846 a court held that a person could not "establish an express for the carrying of letters in connection with, or as part of his business of a merchandise express, although no charge was made for letters as such." *United States v. Thompson*, 28 Fed. Cas. 97, 98 (D. Mass.) (No. 16, 489). In his 1896 opinion concerning the Private Express Statutes, the Attorney General similarly concluded that "the express or implied obligation of railroads to carry letters for each other to remotely connecting lines would amount to 'compensation' within the meaning of the statute" (21 Op. Att'y Gen. at 401).

Congress understood and approved of that construction. During the debate on the 1909 amendments, one senator asked whether a proposed amendment prohibiting private carriage "for compensation" would allow railroads to carry mail for connecting carriers "under some common understanding," so that "there would be a network of railroad companies all over the United States carrying mail for one another." 42 Cong. Rec. 1905 (1908) (Sen.

Sutherland). Senator McLaurin responded that the amendment, which was not enacted, would not have had that effect, "for if [the carriers] were to make an arrangement of that kind it would itself be for compensation. It would be a quid pro quo and it would violate the law." *Ibid.*

Following the understanding of Congress, the courts, and the Attorney General, the Postal Service has long defined "compensation" to include non-monetary compensation. In 1934 it summarized the law by stating that the private-hands-without-compensation exception would not allow truckmen who deliver merchandise also to deliver letters, even though no additional charge were made for delivery of the letters, since "the contract is for the entire service performed." United States Post Office Dep't, *The Private Express Statutes* 9-10 (1934). In 1952 the Postal Service stated that the phrase "private hands without compensation" denotes "transportation of a letter which does not take place in the course of business of the person or firm carrying the letter." United States Post Office Dep't, *Restrictions on Transportation of Letters* 18 (4th ed. 1952). Current Postal Service regulations similarly provide that, "when a business relationship exists or is sought between the carrier and its user, carriage by the carrier of the user's letter will ordinarily not fall under this exception." 39 C.F.R. 310.3(c) (reprinted in J.S. App. A110). The Postal Service applied those regulations in the series of opinion letters (discussed above) concerning school districts, concluding that carriage of letters by a school district for a teacher's union is not carriage by "private hands without compensation," since the employer receives compensation in the form of the services of

the teachers and the good will of the union. See J.S. App. A69-A71.

b. Consistently with its regulations and its prior opinions, the Postal Service's advisory opinion here reasonably explained that an employer's carriage of letters from a union to employees normally would not be undertaken "without compensation" (J.S. App. A69-A72). Given the arm's-length relationship between the parties, the employer in such circumstances will typically expect "actual or hoped-for benefits" in exchange, whether in the form of "increased good will on the part of employees or of their representatives, in the forbearance [*sic*] of demands for other benefits, or in the facilitation of a continuing relationship" (*id.* at A71).

The Postal Service noted in its advisory opinion that this case differs from the school district cases in that the University's obligation to carry the Union's letters is imposed by state law rather than by agreement between the University and the Union (J.S. App. A73). But that fact is completely irrelevant. The University is an instrumentality of the State of California, and the University's employees are state employees. Just as in the case of a private employer that agrees to carry union letters, the State presumably ordered its universities to do so in order to obtain good will from its employees and the unions that represent them, and ultimately to obtain benefits flowing from that good will (*id.* at A72 & n.1). Indeed, the court of appeal's statements (J.S. App. A9, A11) that the requested carriage was part of the University's "business" under state law, and that the carriage would enhance "harmonious labor relations," plainly presuppose that the carriage would yield the University an indirect quid pro quo. Moreover, as the Postal Service noted in its advisory opin-

ion, the private-hands-without-compensation exception appears to have been "intended to permit the gratuitous carriage of letters that may be voluntarily undertaken out of friendship," whereas "the carriage contemplated here is in no sense a gratuitous act" (*id.* at A72).¹¹

Finally, as is the case with the Postal Service's construction of the letters-of-the-carrier exception, its construction of the private-hands-without-compensation exception is of long standing, was developed contemporaneously with the enactment of the statute, has been applied consistently, and promotes the statute's revenue-protection purposes. It is accordingly worthy of the greatest deference.

2. The Board's reliance on a Postal Service regulation suspending application of the Private Express Statutes for letters of college and university organizations was also misplaced. That suspension extends to "*bona fide* student or faculty organizations" (39 C.F.R. 320.4 (*reprinted in* J.S. App. A114)). It is intended to cover "core" university organizations that would be covered by the letters-of-the-carrier exception but for the happenstance that the organization in question is legally distinct from the university (J.S. App. A74). As the Postal Service concluded in its advisory opinion (*id.* at A74-A75), a labor union seeking to represent a University's custodial employees "is neither a student nor a faculty organiza-

¹¹ Cf. 42 Cong. Rec. 1905 (1908) (Sen. McLaurin) (proposing to amend Rev. Stat. § 3985 (2d ed. 1878) to bar private carriage "for compensation," since "there ought to be some provision whereby an innocent man, probably one in an humble position and following an humble pursuit, would not stumble into a pitfall when, out of the goodness of his heart, he was trying to do a favor to some friend * * *").

tion" and is therefore outside the scope of the suspension.

Contrary to the Board's belief (J.S. App. A42), that conclusion poses no constitutional problem whatsoever. As an initial matter, it is clear that internal mail systems generally are not public forums. This Court so held in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-49 (1983).¹² Accordingly, "[t]he touchstone for evaluating * * * distinctions [in access to an internal mail system] is whether they are reasonable in light of the purpose which the forum at issue serves" (*id.* at 49). The Postal Service's distinction between student and faculty organizations, which are functionally part of a university, and labor unions, which exist in an adversarial relationship to the university, is obviously reasonable, since campus mail systems exist to facilitate communication within campus communities.

The Board's suggestion that this distinction is "constitutionally suspect" on equal-protection grounds (J.S. App. A42) is meritless. That suggestion was based on the fact that, at the time the Board issued its decision, "the Postal Service ha[d] not ruled out the possibility that a labor organization representing faculty members at a college or university could use the internal mail system under the suspension" (*id.*

¹² The facts in *Perry Education Ass'n* presented a much stronger case for the argument that the internal mail system was a public forum than do the facts here. The record there showed that the school district had allowed "outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations" to use its mail system (460 U.S. at 47). The record here shows that "[t]he only example of the charitable and other non-employee organization use of the mail system on the Berkeley campus was the United Way campaign" (J.S. App. A52).

at A42). The Postal Service has since concluded, however, that a faculty union may not use an internal campus mail system to send letters to faculty members. PES No. 86-1 (Jan. 6, 1986). While it appears, contrary to the Board's belief, that a distinction between faculty unions and custodial unions would be reasonable, the fact that the Postal Service has now determined that no unions may send routine correspondence to employees through a university's internal campus mail system completely answers the Board's concern.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

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No. 86-935

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD, *et al.*,
Appellees.

On Appeal From The California Court Of Appeal,
First Appellate District

**BRIEF FOR THE AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO
AS AMICUS CURIAE SUPPORTING APPELLEES**

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INTEREST OF THE AMICUS CURIAE

The American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) is an association of over one million employees of state, county and municipal governments. AFSCME members work for many large public employers which, like Appellant Regents of the University of California,¹ operate internal

¹ This Brief will use the term "Regents" to describe the Regents of the University of California, the governing body of the Uni-

mail systems. In fact, AFSCME has 32 locals which represent approximately 25,000 employees of the University of California. Local 3210 represents all service employees at the University, including Appellee William H. Wilson as well as all other former members of Appellee Local 371.² These associations of employees of the University have a direct interest in the enforcement of the Public Employment Relations Board's order that the University "cease and desist from . . . [d]enying employees their right under the Higher Education Employer-Employee Relations Act by refusing employee organizations access to its internal mail system." A-44.

AFSCME endorses the decision of the California Court of Appeal which held that this effort to facilitate communication among employees and between employee and employer do not violate the federal Private Express Statutes.

AFSCME submits this brief with the consent of the parties pursuant to the Rules of this Court.

SUMMARY OF ARGUMENT

The California Higher Education Employer-Employee Relations Act as applied in this case does not conflict with the federal Private Express Statutes. The carriage at issue falls into both the "letters of the carrier" and the "private hands without compensation" exceptions to the Statutes. 18 U.S.C. §§ 1694, 1696(c).

versity. It will use the term "University" to describe the entire institution of higher education. This is in intentional contrast to the Regents' Brief wherein the Regents designate themselves the "University." Brief for Appellant at 3.

² All AFSCME locals at the University were reorganized from a campus-wide to a university-wide basis after the Public Employment Relations Board redefined the units for collective bargaining with the University. See *In The Matter Of: Unit Determination for Service Employees of the Univ. of California*, PERB Decision No. 245-H, 6 PERC par. 13230 (1982).

The carriage falls into the "letters of the carrier" exception. Labor relations are part of the "current business" of the University. State law requires that the University conduct its labor relations using a system of collective bargaining. State law also provides that communication among employees and between employee organizations and employees is an integral part of that collective bargaining system. Union letters to employees therefore relate to the "current business" of the University.

The employees receive the letters as agents of the University. In setting forth how the University must conduct its business in the area of labor relations, the state legislature gave two parts of the University—administration and employees—distinct, but equally important roles. In taking actions necessary to fully participate in the process of collective bargaining, employees act on behalf of and as part of the University. Collective bargaining cannot take place unless employees organize and form unified positions. The employees therefore receive letters from their organizations as agents of the University.

The carriage also falls into the "private hands without compensation" exception. The sender union will not compensate the carrier university in any manner for carrying the union's letters. The University has a statutory obligation to carry the letters. The University will not carry the mail pursuant to an agreement with the union under which the University will, in return, obtain concessions from the union. Nor will the University carry the mail simply as part of an ongoing business relationship with the union and thus with the expectation that the carriage will elicit good will. The union will not pay the University nor will the union's good will toward the University increase because the University is bound by state law to carry the letters. The University will carry the letters "without compensation."

The order of the Public Employment Relations Board does not conflict with the Private Express Statutes.

ARGUMENT

I. This Court Should Defer To The Construction Of State Law And The Factual Findings Of The Public Employment Relations Board And California Court of Appeal

The case before this Court involves interrelated issues of state and federal law as well as questions of fact. The scope of the Private Express Statutes and the definition of its exceptions are questions of federal law, but the Statutes cannot be applied in this case without resolving questions of state law. California state law defines the "current business" of the University of California and also sets forth how that business shall be conducted. This Court must grant deference to the Postal Service's construction of the Private Express Statutes, but it must also defer to the California Public Employment Relations Boards' and California Court of Appeal's construction of the state laws defining the "current business" of the University to include carrying mail from employee organizations to University employees.

Similarly, the Private Express Statutes cannot be applied in this case without resolving questions of fact. It is a question of fact whether the union will compensate the University for carrying its mail. The Public Employment Relations Board was the finder of fact in this case. The Board conducted two evidentiary hearings. A-81, 48. In contrast, the Postal Service engaged in no fact finding of any kind. In fact, the Service never held a hearing, much less an evidentiary hearing, before expressing its opinion in this case. Moreover, the factual questions raised by this case relate to labor relations. The Board has expertise in this area, the Service does not. This Court should therefore grant substantial deference to the factual finding of the Public Employment

Relations Board that the University will carry the mail "without compensation."

II. The California Higher Education Employer-Employee Relations Act As Applied Does Not Conflict With The Federal Private Express Statutes

The order of the Public Employment Relations Board is not in conflict with the Private Express Statutes because carriage of the letters at issue falls into two separate exceptions to the prohibition of private carriage: (1) the "letters of the carrier" exception, 18 U.S.C. § 1694, and (2) the "private hands without compensation" exception, 18 U.S.C. § 1696(c).

A. Letters To University Employees Concerning Labor Relations Are "Letters Of The Carrier"

The Board's order does not conflict with federal law because the union letters to University employees are "letters of the carrier." 18 U.S.C. § 1694 excepts from the prohibition of private carriage of mail letters which "relate . . . to the current business of the carrier." In regulations adopted under the Private Express Statutes, the Postal Service further specified the scope of the "letters of the carriers" exception.

The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the individual actually carrying the letters is not the person sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person (see § 310.3 (b) (2)) and the letters must relate to the current business of such person.

39 C.F.R. § 310.3 (b) (1).³

³ The Service's regulation may improperly constrict the scope of the statutory exception but, as discussed *infra* at 8-13, the union's letters to employees satisfy even the more restrictive test.

The letters satisfy both the statutory and regulatory definitions of the exception. The letters relate to the "current business" of the University and the letters are carried by University employees to University employees. Furthermore, even accepting the additional requirement proposed by the Regents, the employees receive the letters as agents of the University.

1. *The Letters Relate To The "Current Business" Of The University*

Hiring, firing, and setting the terms and conditions of employment of University employees is certainly part of the "current business" of the University. State law declares that "[h]armonious relations between [the University] and its employees are necessary to" "providing an academic community with full freedom of inquiry." Cal. Gov't Code § 3560(d), (c). Moreover, state law goes beyond establishing that harmonious labor relations are essential to fulfillment of the University's purpose. State law also sets forth the "means by which" the University must conduct its labor relations. Cal. Gov't Code § 3560(e). The University is obligated to participate in a system of collective bargaining. The letters at issue⁴ are an integral part of the collective bargaining system through which the University must attempt to achieve the harmonious labor relations essential to operation of the academy. The letters therefore "relate . . . to the current business of the carrier." 18 U.S.C. § 1694.⁵

The letters thus cannot be viewed as relating solely to the business of the union. The University has more than

⁴ The sender of the letters, AFSCME Local 371, is a labor organization as defined by state law and the letters relate exclusively to labor relations. Cal. Gov't Code § 3562(g); R. 276-77.

⁵ State law recognizes in other ways that collective bargaining is an integral part of the "current business" of the University. For example, state law provides that union representatives shall be released from their normal duties "without loss of compensation" to conduct union business. Cal. Gov't Code §§ 3569, 3569.5(a).

an "amorphous and long range" interest in the letters. Brief for the United States at 21. The letters are part of the University's labor relations system; so integral a part that the state law which establishes the system specifically mandates carriage of the letters. Cal. Gov't. Code § 3568.

This Court has found that facilitating communication between union and employees may be part of the "official business" of a public employer even in the absence of a legal obligation to do so. In *Perry Education Ass'n v. Perry Local Education Ass'n*, 460 U.S. 37 (1983), this Court upheld a school board's policy of granting exclusive access to its internal mail system to an association of teachers which had been designated the sole representative of all teachers after an election held pursuant to state law. This Court found that granting such access was consistent with the board's interest in "preserv[ing] the [school] property . . . for the use to which it is lawfully dedicated." *Id.* at 50-51 (quoting *United States Postal Service v. Council of Greenburgh Civil Assns.*, 453 U.S. 114, 129-30 (1981)). Prior to the designation of an exclusive representative, the board had granted access to all associations representing teachers. This Court found that such access "was [also] consistent with the School District's preservation of the facilities for school-related business." *Id.* at 48. This Court expressly rejected the assertion that the union mail did not relate to "official business" because the contents were not endorsed by the board. *Id.* at 51 n.10. Although this Court declined to reach the question raised by this case in *Perry*, *id.* at 39 n.1, this Court did there endorse the principle that union correspondence to employees may be part of the "official business" of a public educational institution.

The University uses its internal mail system to communicate the administration's views on labor relations to employees. R. 290-91; Supp. R. 532, 533, 537, 541.

The Postal Service has not and could not challenge this private carriage. But collective bargaining requires two parties. If the administration's formulation and promulgation of its positions relates to the "current business" of the University, then employees' organizing and communicating must also relate to the "current business" of the University.

The letters relate to the "current business" of the University.

2. The Letters Are Carried By University Employees And Sent to University Employees As Agents Of The University

There is no dispute about the facts that the letters are carried by University employees to University employees. The central disagreement between the parties to this case concerns whether the letters are "addressed to" the University when they are actually delivered to University employees. 39 C.F.R. § 310.3(b)(1). Obviously, an institution can only receive mail through its employees. Nevertheless, the Regents assert that it is not sufficient that the mail both (1) relates to the current business of the University and (2) is received by University employees. The Regents insist that the employees must receive the mail as agents of the University.

39 C.F.R. § 310.3(b)(1) specifies that the actual carriers must be officers or employees of an institutional sender or addressee, but it does not specify the relationship which the actual recipients must have to an institution for the letters to be considered "addressed to" the institution. *Id.* Nevertheless, whether or not the Regents' narrowing construction comports with the statute or the regulation, it is clear in this case that the employees do receive the letters as agents of the University.

A university is an extraordinarily complex institution.⁶ Yet the Regents argue here that the University acts exclusively through its central administration. The Regents assert that employees do not receive mail on behalf of the University unless the mail is open to the administration, the employees' response to the mail is controlled by the administration, and there is no conflict between the employees and the administration concerning the subject of the mail. These contentions comport neither with state law defining how the University must conduct its labor relations nor with the realities of the modern university.

In setting forth how the University must conduct its business in the area of labor relations, the state legislature gave administration and employees an equal voice. The legislature found that a process of bargaining would suit the purposes of the University more than the unfettered exercise of authority by the administration. In taking those actions necessary to participate fully in this process of dialogue and negotiation with the administration, employees act on behalf of and as part of the University. The process cannot function unless employees organize and formulate unified positions. Employees therefore receive mail from their organizations as agents of the University.

The state legislature might have devised other systems of labor relations for the University. For example, the legislature might have created an ombudsman within the University to whom employees could complain and who would act as their advocate before the administration. Certainly, communications from employee to ombudsman

⁶ Clark Kerr, the former President of the University of California, coined the term "multiversity" to describe the modern university. C. Kerr, *The Uses of the University* 1 (1972). By using this term, he sought to emphasize that "[t]oday the large American university is . . . a whole series of communities and activities held together by a common name." *Id.*

and ombudsman to employee could be carried in the campus mail. Similarly, the legislature might have chartered a single University employee organization and mandated participation in the organization which would then bargain with the administration. Again, it is clear that employees would receive mail from such an organization as part of their function as University employees. A system of labor relations in which employees can form their own organizations serves the same functions as these hypothetical alternatives. And in each case, employees receive communications—from the ombudsman, the company union, or their own organization—as employees and in order to play their role in the labor relations system of the University. In each case, the employees receive the mail as agents of the University.

The opinion of the United States Attorney General concerning the Erie Employees' Relief Association is thus inapposite. 29 Op. Att'y General 418 (1912). In that case, the Association sent mail to the employees of the Erie Railroad Company because it wanted them to participate in a pension plan. The mail was sent to the employees because they were employees of the Railroad, but not as employees of the Railroad. The Erie Employees' Relief Association's mail is more similar to a solicitation from a close-to-campus restaurant directed to University employees⁷ than it is similar to the letters from the employee organization at issue here. As stated by the Attorney General, the Railroad had no more than a passing "interest" in the subject of the letters. *Id.* at 419. Unlike the relationship between the employee organization and the University here, the Relief Association did not have a statutorily defined role in the labor relations of the Railroad. The Relief Association did not interact with the Railroad in collective bargaining. And

⁷ Or like the insurance company cited by the Regents and the United States or the used car salesman cited by the United States. Brief for Appellant at 15-16; Brief for United States at 13.

unlike the specific and programmatic interest of the Regents in facilitating and participating in a stable collective bargaining system as required by state law, the Railroad's interest in the benefits the Relief Association promised its employees was simply an amorphous interest in the well-being of its employees. In short, the Relief Association's mail was not needed by the employees in order for them to play their role in a statutorily mandated system of labor relations within the Railroad. The opinion is therefore inapposite.

Both the Regents and the United States contend that employees cannot receive mail on behalf of the University if the administration cannot intercept and review the mail. Brief for Appellant at 17; Brief for the United States at 20. As stated by the United States, this argument is completely circular. "[A] letter the contents of which are protected from disclosure to the University cannot be deemed to be a letter 'of the University.'" Brief for the United States at 20 (quoting Jurisdictional Statement at 15). The problem with this formulation is that there is no such person as "the University." The University must receive mail through its agents and the question is therefore whether a letter received by one agent of the University can be deemed a letter to the University even though its contents cannot be disclosed to another agent of the University. The Regents' argument rests on the assumption that the administration is the paramount agent of the University and exercises plenary authority in all areas. This assumption does not recognize the complexity of the modern university and, specifically, conflicts with state law in the area of labor relations.

The fact that the administration is not privy to the contents of the letters at issue does not suggest that they are not "addressed to" the University. Within a modern university, many forms of privileged communication are necessary to carry out the business of the university. A

doctor in the University's psychiatry department may send a patient's records through campus mail to another treating physician in internal medicine. The President of the University could not demand access to these records, yet certainly the employees send and receive them as parts of the University and in order to perform their roles within the University. Similarly, as discussed above, the University might appoint an ombudsman to hear employees' complaints and attempt to resolve them. In order to eliminate fear of retaliation, the University might adopt a policy of confidentiality in relation to such complaints. But again, the ombudsman clearly receives the complaints as part of the University and so that he may better serve the University. In this case, the administration may be barred from interfering with communication between employees and their organization, not because such communication does not relate to the business of the University, but in order to facilitate the open communication necessary for employees to effectively perform their roles in the system of collective bargaining. The confidential character of the letters does not suggest that they are not "addressed to" the University.⁸

Similar flaws in reasoning undermine the Regents' contention that the mail at issue is not addressed to

⁸ The Regents argue that they must have access to all mail carried by the University to insure that its carriage does not violate federal law, but that it would be an unfair labor practice if they opened the union's letter to employees. It is in no way certain, however, that the Regents would commit an unfair labor practice by reviewing the union mail to determine if it was confined to labor relations matters. If the Regents designated a mail inspector to perform this task who had no relationship to the administration officials who engage in collective bargaining, it is likely that the Public Employment Relations Board would not find any interference with employees' rights. Cal. Gov't. Code § 3571(a), (d). Moreover, even if the Board were to make such a finding, reconciling the Regents' obligations under federal law with their obligations under state law should, in the first instance, be a remedial question for the Board.

the University because the administration cannot control employees' response to the mail. The Regents assert that there may, in fact, be a conflict of interest between administration and employees concerning the subject of the correspondence. Brief for Appellant at 15-17. But the administration cannot control the staff doctor's response to medical records, it cannot control the professor's grading of a paper sent through campus mail, and it cannot direct the ombudsman's handling of an employee's grievance. Freedom and conflict are inherent in the varied roles and relationships within a university.⁹ The state legislature has mandated a system of arms-length negotiation between two groups, both of which are part of the University even though their perspectives sometimes differ—administration and employees. The employees receive the letters and use them to play their assigned role within this collective bargaining system mandated by the state legislature to govern labor relations in the University. The employees receive the letters as part of the University. The letters are therefore letters of the carrier.

B. The Letters Are Carried "By Private Hands Without Compensation"

The Public Employment Relations Board's order does not conflict with federal law for a second and independent reason: the letters at issue are carried "by private hands without compensation." 18 U.S.C. § 1696(c).

The Private Express Statutes were enacted to prevent carriage of letters for hire. The first version of the laws enacted in 1792 prohibited private carriage of letters "for hire or reward." Act of February 20, 1792, ch. 7, § 14, 1 Stat. 236. The Postal Act of 1845, which codified

⁹ Former President Kerr wrote that "in the multiversity, [interests] are quite varied, even conflicting." He described "the modern university [as] a 'pluralist' institution—having several centers of power." C. Kerr, *The Uses of the University* 19, 136 (1972).

the restriction in essentially the same form in which it remains today, expressly excepted transmission "by private hands, no compensation being tendered." Act of March 3, 1845, ch. 43, § 11, 5 Stat. 732. The legislative history is replete with statements, like that of Senator Teller in 1908, that "the real purpose" of the statutes is "to prevent the carriage for profit." 42 Cong. Rec. 1902 (1908). The Statutes protect the Postal Services' monopoly by "prevent[ing] private carriers from competing selectively with the Postal Service on its most profitable routes." Brief for the United States at 11. The Statutes are not concerned with carriage which does not involve "compensation."

This case does not involve private carriage *for hire*. The union will not compensate the University in any manner for carrying the letters. Rather, the University will carry the letters only because it has a legal obligation to do so.

It is horn book law and also a matter of simple logic that the performance of a legal obligation is not consideration. Restatement (Second) of Contracts § 73 at 179 (1981); A. Corbin, 1A Corbin on Contracts § 180 at 137, § 189 at 172 (1950); S. Williston, 1 Treatise on the Law of Contracts § 132 at 557 (1957); Cal. Civil Code § 1605. A party is highly unlikely to give something of value and get nothing in return. Thus the union in this case will not compensate the University in any way for performing its legal duty. The union will not pay the University. Nor will the union's good will toward the University be increased.

Whether "compensation" will flow from the union to the University in return for the carriage of mail is both a question of fact and a question concerning labor relations. The Public Employment Relations Board conducted two evidentiary hearings in this case. It is also a body with considerable expertise in the area of public sector labor relations. The Board found that no "compensation"

would be exchanged in this case. This Court should defer to the Board's finding.

This case is profoundly unlike the previous cases concerning employee organizations reviewed by the Postal Service.¹⁰ In each of the previous cases, the employer delivered the letters either pursuant to a collective bargaining agreement or, at least, in the absence of a statutory duty to do so. When carriage was pursuant to agreement, the Service found that "compensation" existed "even though no specific consideration is assigned to that item." U.S. Postal Serv. PES 76-4 Reconsidered at 4 (Ja. 15, 1982). Even when there was no express agreement, the Service found that when "the carriage of letters is performed by one party to an ongoing economic relationship for the benefit of another party, . . . the act simply cannot realistically be isolated from the context of the relationship and characterized as being 'without compensation.' . . . [I]n the business world, compensation can take the form of non-monetary consideration or good will." *Id.* Even the Postal Service acknowledges that "the fact that the carriage is not willingly undertaken" in this case, but is instead "imposed on the public employer by state law" distinguishes this case from the earlier cases. A-71. No contractual basis for the obligation exists and no increase in good will can be expected because the University is compelled by law to carry the letters.

The Postal Service cannot blindly refuse to except all carriage simply because a business relationship exists between carrier and sender. Its own regulations are not so categorical. 39 C.F.R. § 310.3(c) provides, "Thus for example, when a business relationship exists or is sought

¹⁰ See U.S. Postal Serv. PES No. 82-10 (July 2, 1982) (School Board of Menatee County, Florida); 76-4 Reconsidered (Ja. 15, 1982) (Salem, Oregon School District); 76-17 (July 28, 1976) (Detroit Public Schools); 76-4 (March 3, 1970); 74-23 (Dec. 19, 1974) (School Board of Brevard County, Florida).

between the carrier and its user, carriage by the carrier of the user's letter will *ordinarily* not fall under this exception." Emphasis added. The regulation expressly provides for an extraordinary case such as this where there is no possibility of indirect or non-monetary "compensation."¹¹ In order to reach this case, the Service must extend the general exclusion of carriage for a business partner from the exception beyond its rationale.

No "compensation" has or will flow from the sender to the carrier in this case. Yet the Regents and the Postal Service argue that the carriage is not by "private hands without compensation." They base this argument on six novel positions which are wholly unsupported by the language of the Statutes, the Service's regulations, and prior advisory opinions.

The Regents and Service first suggest that carriage is not without "compensation" because the University will use legislatively appropriated funds to effect the carriage. In effect, this argument suggests, the State of California will compensate the University for carrying the union's mail.

This argument distorts the meaning of the word "compensation" as used in the Statutes. "Compensation" clearly means payment by the sender in return for the carriage. The State is not the sender in this case. Moreover, the State in no way compensates the University for carriage of mail, much less for the particular carriage at issue. The University defrays the costs of its mail system from general funds appropriated by the legisla-

¹¹ Similarly, in U.S. Postal Serv. PES 77-8 (Feb. 4, 1977), the Service opined that the exception "does not apply when the private carriage of letters, although performed without money compensation, is offered *only* because of a business or economic relationship between the carrier and the persons for whom the letters are carried." Emphasis added. Here, the economic relationship between University and union is not the *only* or even a reason for the carriage.

ture. There is no line item for the mail system, much less for carriage of the union mail. R. 396. Funds have been and will continue to be appropriated independent of the University's compliance with the Board's order to carry the union mail. Supp. R. 588. State funding is not "compensation" within the meaning of the Statutes.

Adoption of the Regents' and its amicus' novel construction of the "private hands" exception would preclude all private carriage by institutions from falling into the exception. All institutional actions are somehow funded by third parties.¹² But in U.S. Postal Serv. PES 77-8 (Feb. 4, 1977), the Postal Service opined that the Indianapolis Board of School Commissioners could deliver food stamp circulars to students without payment of postage under the "private hands without compensation" exception. Using the rationale it propounds in this case, however, the Service would have prohibited such carriage because the Board was compensated by the City for carrying the circulars. State funding does not remove the carriage from the "private hands" exception.

Second, the Regents argue that "compensation" would be paid in this case in the form of a "lack of sanctions." Brief for Appellant at 39. But this argument is both speculative and inconsistent with the meaning of the term "compensation" as used in the Private Express Statutes. The Regents have not been threatened with any sanction. In fact, the Public Employment Relations Board has authority to order the Regents "to cease and desist from [an] unfair practice," but not to impose any form of fine for noncompliance with such an order. Cal. Gov't. Code § 3541.5(c). The Board may seek enforcement of its order in court. The Board will not seek a contempt citation, however, but a writ of mandamus. Cal. Gov't

¹² In fact, all individual actions are similarly funded by third parties in that individuals receive wages which they necessarily utilize in traveling to deliver a letter even if such delivery is motivated only by friendship.

Code § 3542(d). It is pure speculation to state that at some future date the Regents might be held in contempt and fined as a result of their refusal to carry the union mail.

Moreover, such a fine would not be "compensation" within the meaning of the Statutes. As demonstrated above, "compensation" must be paid by the sender to the carrier. Even under the scenario imagined by the Regents, the union will not pay any form of "compensation" to the Regents.

Third, the Regents and the United States assert that the carrier in this case is not the University, but is instead the State of California. From this premise, they argue that the State, through its Public Employment Relations Board, is ordering itself, through its University, to deliver mail to state employees at the University in the expectation of obtaining, in exchange, the good will of the employees. Brief for United States at 26. The flaw in this argument is that the Regents are a legally distinct and autonomous body, vested with power to govern the University and an identity separate from the State. If this were not true, the Regents could not be engaged in this litigation, in opposition to another state agency, attempting to escape the obligation imposed on them by state law. The California Constitution establishes the University as a legal entity and vests the Regents "with full powers of organization and government" over the University. Cal. Const. art. 9, § 9(a). The Constitution further provides that the University is "subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university . . . and competitive bidding procedures." *Id.* State statutory law also clearly and expressly establishes that the Regents, not the State, are the employers of University employees. Cal. Gov't. Code § 3562(h). The Postal Service cannot ignore the distinct identity of the University un-

der state law in order to find that the State is voluntarily carrying the union mail in the expectation of obtaining, in exchange, good will from its employees.

Fourth, the Regents and Board assert that no carriage required by law can be considered carriage "by private hands without compensation." The Service asserts, "while the legislative purpose behind this exception is not clearly stated, it seems evident that it must have been intended to permit the gratuitous carriage of letters that may be voluntarily, undertaken out of friendship." A-72. Thus the Service turns the Statutes on their head, instead of criminalizing only carriage for "compensation," the Service asserts they criminalize all but carriage for friendship. Nothing in the language of the Statutes or the regulations or in the legislative history supports this narrowing construction. On the contrary, the Statutes have always been limited to carriage "for hire" and excepted carriage "by private hands, no compensation being tendered." Act of Feb. 20, 1792, ch. 7, § 14, 1 Stat. 236; Act of March 3, 1845, ch. 43, § 11, 5 Stat. 732. The Statutes have always been concerned solely with commercial carriage—with the possibility that a private carrier might compete economically with the Postal Service. If there is no "compensation" the Statutes do not discriminate among motives for private carriage.¹³

Fifth, the Regents and the Postal Service suggest that no public entity can ever utilize the "private hands without compensation" exception. Invoking a simple dichotomy between private and public, this assertion defines the term "private" in the abstract instead of in the context of the Private Express Statutes. As used in the Statutes, however, "private" means other than the Postal Service.

¹³ Requiring the Postal Service to consider motivation rather than whether any form of "compensation" is being exchanged would embroil the Service in an impossible task.

The very confusion evoked by this argument was dispelled by the Service through regulation. 39 C.F.R. § 310.1(e) provides:

"Private carriage", "private carrier", and terms of similar import used in connection with the Private Express Statutes or these regulations mean carriage by anyone other than the Postal Service, regardless of any meaning ascribed to similar terms under other bodies of law or regulation.

This definition clearly provides that "private hands" include the University.

The Postal Service has used the regulatory definition in all prior cases. For example, in U.S. Postal Serv. PES 77-8 (Feb. 4, 1977), the Service opined that the Indianapolis Board of School Commissioners were "private hands" when delivering food stamp circulars to students.

The inclusive definition of "private hands" is supported by the 1896 opinion of the Attorney General. 21 Op. Atty. Gen. 394 (1896). In that opinion, the Attorney General clearly stated, "'private hands' was evidently intended to cover all except common carriers on post routes." *Id.* at 401.¹⁴ The University's hand are "private hands."

Finally, the Regents argue that "private hands" cannot reach as far as the University's mail system. But there is nothing in the Statutes, the legislative history, the regulations, or prior advisory opinions suggesting that the size of the carrier or the scope of its carriage precludes application of the "private hands" exception.

The University's carriage of the union mail would be "by private hands without compensation."

¹⁴ The Attorney General excluded common carriers from the definition of "private hands without compensation" because they are in the business of transportation for profit. *Id.*

CONCLUSION

For all of the above-stated reasons, this Court should affirm the judgment of the California Court of Appeal.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

9
No. 86-935



IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
v. *Appellant,*
PUBLIC EMPLOYMENT RELATIONS BOARD,
and *Appellee,*
AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, LOCAL 371, and
WILLIAM H. WILSON, PRESIDENT, LOCAL 371,
Appellees.

On Appeal from the Court of Appeal
of the State of California
First Appellate District

**BRIEF OF AMICUS CURIAE CALIFORNIA FACULTY
ASSOCIATION SUPPORTING APPELLEES**

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THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
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AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, LOCAL 371, and
WILLIAM H. WILSON, PRESIDENT, LOCAL 371,
Appellees.

On Appeal from the Court of Appeal
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BRIEF OF *AMICUS CURIAE* CALIFORNIA FACULTY
ASSOCIATION SUPPORTING APPELLEES

INTEREST OF CALIFORNIA FACULTY ASSOCIATION

The parties have consented to the filing of this brief in letters filed herewith.

The interest of the California Faculty Association ("CFA") in this case arises from its role as the exclusive

representative, for collective bargaining purposes, of approximately 19,000 full and part-time faculty members employed by the California State University ("CSU"), a 19-campus system of public four-year colleges and universities. Relations between the CFA and the CSU are governed by the Higher Education Employer-Employee Relations Act ("HEERA"), Cal. Gov't. Code §§ 3560-3599, as are relations between the parties to this appeal. In their collective bargaining agreement, the CSU and the CFA have recited that the CSU shall make available to the CFA both the intra-campus mail service and faculty employee mailboxes for official CFA communications. Attached to this brief as Exhibit "A" is a copy of Article 6, § 6.3 of the collective bargaining agreement between the CSU and the CFA, where this provision is set forth.

The CFA has found the ability to communicate with its constituents through the intra-campus mail service and faculty employee mail boxes to be of invaluable assistance in fulfilling its role as the faculty's bargaining agent. This appeal is of vital interest to the CFA because the outcome may have a serious impact on its continuing ability to communicate effectively with those it represents.

SUMMARY OF ARGUMENT

California Government Code § 3568, as definitively interpreted by the state's court of last resort, confers upon employee organizations such as appellee American Federation of State, County and Municipal Employees, Local 371 ("AFSCME") the right to use the internal mail system maintained by The Regents of the University of California ("UC") for the purpose of communicating with their employee constituents. In enacting this statute, the State of California has created a "limited public forum," access to which may not be denied absent a compelling state interest. Alternatively, the state has opened a "non-public forum," access to which may be denied only

by viewpoint neutral regulations which are reasonable in light of the purpose for which the forum was created.

Whether the state has created a "limited public forum" or a "non-public forum," UC's refusal to permit AFSCME or any other employee organization to use the forum for its intended purpose cannot be justified. The exclusion of employee organizations serves no compelling state interest, is hardly reasonable in light of the reasons for which the forum was established, and is anything but viewpoint neutral.

Proper resolution of the dispute in this case is not, as appellant would have it, merely a matter of choosing between plausible constructions of the Private Express Statutes and their exceptions, then invalidating the California statute as inconsistent with the interpretations favored by appellant. The implications of this case are far weightier than that. What must be done here is to harmonize these federal statutes with the First Amendment, in light of the fact that California has created a forum, access to which is governed by constitutional principles. Appellees and the California Court of Appeal have proposed interpretations of these federal statutes which will avoid the constitutional clash that appellant's interpretations would provoke. Appellees' interpretations should be adopted and the decision below affirmed.

ARGUMENT

I. The Statutory Interpretations Advanced By Appellant UC, If Adopted, Would Produce An Unconstitutional Imbalance Favoring The Public Employer's Speech Over That Of The Representative Of The Public Employees.

This case presents an issue to which the Court has previously alluded but never directly addressed itself: whether the delivery of material sent by a labor union to its employee members through a state university's internal mail system falls within the "letters-of-the-carrier" or "private-hands-without-compensation" exceptions to the Private Express Statutes, 18 U.S.C. §§ 1694, 1696(c).¹ The interpretations of those exceptions advanced by appellee Public Employment Relations Board ("PERB") and adopted by the California Court of Appeal are reasonable ones, faithful to both the letter and the spirit of the federal statutes. Their logic is fully explicated in the briefs of appellees and will not be reiterated here.² Rather, *amicus curiae* CFA will address

¹ The question was left open in *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 40 n.1, 103 S.Ct. 948, 71 L.Ed. 2d 291 (1983), a decision upholding the right of a school district to grant exclusive access to the district's internal mail system to a certified bargaining representative through a collective bargaining agreement.

² One point, however, deserves special mention. The Solicitor General argues that a collectively bargained agreement to provide access to an internal mail system necessarily entails non-monetary compensation in the form of "actual or hoped for benefits" or "increased good will." Br. 26. While that may be true in the case of a private employer, it is not true here. The State of California has already removed mail system access from the give-and-take of collective bargaining for motives the Solicitor General has neglected to consider: respect for the First Amendment, a desire to operate lawfully within its bounds, and a wise appreciation for the salutary effect of open communication on a topic of such importance. The California Legislature has mandated access by statute, thereby removing the need for any reciprocal concession

the constitutional implications of adopting the contrary interpretations advanced by appellant UC and will argue that the PERB's interpretations are to be preferred because they harmonize the Private Express Statutes and their exceptions with the dictates of the First Amendment.

The practice which has been challenged in this case, that of providing public employee unions access to internal mail systems to facilitate communication with their constituents, has become relatively commonplace. Many states currently permit or require their state universities, colleges or school districts to deliver union mail through their internal mail systems.³ Similar rights of access have undoubtedly been won by employees in the private sector as well. But here, the fact that a state rather than a private employer has granted such access is critical in light of the First Amendment rights thereby implicated.

California Government Code § 3568 is part of a comprehensive legislative treatment of public employer-employee relations in the context of higher education, embodied in the Higher Education Employer-Employee Relations Act ("HEERA"), Cal. Gov't Code §§ 3560-3599, enacted in 1978. Under § 3568,

Subject to reasonable regulations, employee organizations shall have the right of access at reasonable

by employee organizations. Nor does the existence of the CSU-CFA internal mail access agreement (Exh. A) undermine this conclusion. Parties to collective bargaining agreements frequently recite duties to which they are already bound by external law, and the CSU had no choice but to agree to abide by its statutory obligation. The UC must do the same, and it can do so consistent with the "private-hands-without-compensation" exception to the Private Express Statutes.

³ In *Perry*, the Court listed a number of state court decisions in which access to the internal mail system was limited to a majority union. 460 U.S. at 43 n.6.

times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of rights guaranteed by this Act.

A. The State Has Created a Limited Public Forum, Open to the Interested Parties, for Communication on Issues Relevant to Labor-Management Relations.

The PERB, in a decision upheld by the California Court of Appeal, has interpreted the phrase "other means of communication" as used in Cal. Gov't Code § 3568 to encompass UC's internal mail system. *The Regents of the University of California v. Public Employment Relations Board*, 182 Cal.App. 3d 70, 76, 82, 227 Cal.Rptr. 57 (1986) (J.S. A-4, A-11).

Of course, the UC mail system is not thereby open to communication by all people on all subjects. Rather, the scope of the forum the California Legislature has created is limited to those purposes which promote its declared findings and intent in enacting the HEERA, that is, "harmonious and cooperative labor relations between public institutions of higher education and their employees." Cal. Gov't Code § 3560(a). As circumscribed by the California Court of Appeal, the forum's dimensions are clear:

We only hold that where, as here, the State Legislature has clearly emphasized the public interest in developing harmonious labor relations between the University and its employees, the internal mail system may be used by the interested parties for purposes of relevant communication.

The Regents of the University of California v. Public Employment Relations Board, *supra*, 182 Cal. App.3d 71, 82, 227 Cal.Rptr. 57 (J.S. A-11, emphasis added).

The forum thus created by the California statute, as definitively construed by the state's judiciary,⁴ is one which meets this Court's definition of a "limited public forum," that is, "a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for discussion of certain subjects." *Cornelius v. NAACP*, 473 U.S. 788, 105 S.Ct. 3439, 3449, 87 L.Ed. 2d 567 (1985) (citing *Perry Education Association v. Perry Local Educators' Association*, *supra*, 460 U.S. 37, 45-46 n.7, 103 S.Ct. 948, 71 L.Ed. 2d 291).

Because the sort of communication in which employee organizations desire to engage is clearly within the scope of the forum that the statute has created, to exclude their views as one-half of the labor-management equation would inevitably run afoul of the Constitution. It is a basic principle of First Amendment law that the government may not regulate speech in ways that favor some viewpoints or ideas at the expense of others. See, e.g., *Healy v. James*, 408 U.S. 169, 188, 92 S.Ct. 2338, 33 L.Ed. 2d 266 (1972) (mere disagreement with the views expressed does not warrant restriction of speech); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96, 92 S.Ct. 2286, 33 L.Ed. 2d 212 (1972) ("government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views"); *Cornelius v. NAACP*, *supra*, 473 U.S. 788, 105 S.Ct. 3439, 3455, 87 L.Ed. 2d 567 (remanding for determination whether excluding certain charities from government-sponsored fundraising list aimed at federal employees was viewpoint neutral).

⁴ As the court said in *Quong Ham Wah Co. v. Industrial Accident Commission*, 255 U.S. 445, 448, 41 S.Ct. 373, 65 L.Ed. 723 (1921), "it is elementary that this court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state."

Were a public employer such as UC allowed to confine public forum access to only one of two competing groups or interests, the constitutional violation would be obvious. "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 175-76, 97 S.Ct. 421, 50 L.Ed. 2d 376 (1976). Here we have the other side of the same coin. The California Legislature has determined not only that higher education employer-employee relations is a public question, but that debate and communication from interested parties are to be encouraged as a worthy government function. Cal. Gov't Code § 3560; *The Regents of the University of California v. Public Employment Relations Board*, *supra*, 182 Cal. App.3d 71, 80, 227 Cal. Rptr. 57 (J.S. A-9). Yet the UC, by asserting that full discussion and debate concerning employer-employee relations is not the business of the state, seeks to reserve to itself the most effective and least expensive means to disseminate its views on one side of that debate—the internal mail system.⁵ In

⁵ Although one could argue that the state should never be permitted to use its resources to influence the employee electorate to favor one side in employer-employee relations matters, that issue is not before the Court. California has by statute determined that the public employer is free to disseminate its views concerning labor relations, provided only that it may not deliver a threat or promise of benefit or express a preference for one employee organization over another. Cal. Gov't Code § 3571.3. This statute is virtually identical to its federal counterpart, LMRA § 8(c), 29 U.S.C. § 158(c), which establishes the employer's free speech right. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-19, 89 S.Ct. 1918, 23 L.Ed. 2d 547 (1969); 1 *The Developing Labor Law* 80-85 (C. Morris ed. 1983). At the same time it bestowed upon the UC a right of employer free speech, the California Legislature required that these channels of communications be open to the employee side of the debate. That choice is compelled by the Constitution in this public sector context in which the state could not have determined that its business is to monopolize that debate or to use its resources to favor one side to the exclusion of the other.

short, the UC would have the Court believe that it is the business of the state and its University to monopolize a legislatively-created forum—a patently unconstitutional proposition. *Carey v. Brown*, 447 U.S. 455, 462-63, 100 S.Ct. 2286, 65 L.Ed. 2d 263 (1980). UC's policy restricting access to the state's communications system for the views of management, while excluding those of labor, constitutes impermissible content-based discrimination.

The possible availability of alternative means of communication is not a relevant inquiry in this context. Government may not defend content-based discrimination against certain speech on the grounds that the message sought to be conveyed has been adequately expressed by others or that it may be expressed at another time or place or through other means. See *Spence v. State of Washington*, 418 U.S. 405, 412 n.4, 94 S.Ct. 2727, 41 L.Ed. 2d 842 (1974) (rejecting state's argument that inhibition on speech could be justified because other means could have been used to express views); *Schneider v. State of New Jersey*, 308 U.S. 147, 163, 60 S.Ct. 146, 84 L.Ed. 155 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15, 96 S.Ct. 1817, 48 L.Ed. 2d 346 (1976) (invalidating state ban on prescription price advertisement; held irrelevant that consumers might be able to obtain price information some other way).

This case is akin to *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed. 2d 440 (1981), where the Court applied the strict scrutiny test to strike down another university's attempt to discriminate against certain speech on the basis of its content. In *Widmar*, the University of Missouri was found to have created a forum generally open for use by registered student groups by allowing them access to campus facilities for meetings and other

activities. Its attempt to exclude one such group based on the religious content of its meetings was held unconstitutional.

Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.

454 U.S. at 268-69, 102 S.Ct. 269, 70 L.Ed. 2d 440 (footnote omitted).

The reasoning in *Widmar* applies here with equal force. In order to justify its exclusion of labor organizations from the limited public forum that the Legislature has created, the University "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* at 270-71. See also *Carey v. Brown*, *supra*, 447 U.S. 455, 461, 464-65, 100 S.Ct. 2286, 65 L.Ed. 2d 263. Yet no argument could possibly justify the exclusion of one out of two opposing viewpoints as "necessary to serve a compelling state interest," especially when the state itself has declared that union access to UC's mail system fulfills an important role in promoting harmonious labor-management relations.

B. Even if the State Is Deemed to Have Created a "Nonpublic Forum," Exclusion of Unions From That Forum Is Neither Reasonable Nor Viewpoint Neutral.

Exclusion of unions from the forum created by the California Legislature is constitutionally repugnant even if a "nonpublic" rather than "limited public forum" has been created. In *Perry Education Association v. Perry*

Local Educators' Association, *supra*, 460 U.S. 37, 47, 103 S.Ct. 948, 71 L.Ed. 2d 291, the Court held that the school mail facilities at issue there were neither a traditional public forum nor a limited public forum, but rather fell into a third category, nonpublic forum. Assuming that UC's internal mail system can likewise be characterized as a "nonpublic forum," access can only be denied to employee organizations "as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's views.'" *Cornelius v. NAACP*, *supra*, 473 U.S. 788, 105 S.Ct. 3439, 3448, 87 L.Ed. 2d 567 (quoting *Perry*, *supra*, 460 U.S. 37, 46, 103 S.Ct. 948, 71 L.Ed. 2d 191).

Put another way, "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions are *reasonable in light of the purpose served by the forum and viewpoint neutral*." *Cornelius*, 473 U.S. 788, 105 S.Ct. 3439, 3451, 87 L.Ed. 2d 567 (emphasis added). UC's discrimination against communication by employee organizations is neither reasonable nor viewpoint neutral. The purpose of the statute in question is to promote open communication on the issue of labor relations and to foster harmonious relations between labor and management in California's institutions of higher learning. That purpose cannot be reasonably served, or indeed served at all, by the exclusion from the most effective and least expensive forum of one of only two opposing views. Furthermore, silencing the unions by definition cannot be "viewpoint neutral" when the only other viewpoint allowed expression is that of management.

The only means for avoiding this constitutionally objectionable result is for the Court to take full account of the circumstances in which this case arises: a state-owned, state-controlled internal mail system which the state has opened for use by both sides of the labor-management debate. In this context, only the interpretations of the

"letters-of-the-carrier" or "private-hands-without-compensation" exceptions to the Private Express Statutes advanced by appellees avoid conflict with the First Amendment.

C. The "Letters-Of-The-Carrier" and "Private-Hands-Without-Compensation" Statutes Must Be Interpreted In Harmony With the First Amendment.

The Private Express Statutes can and must be harmonized with the First Amendment. To adopt the PERB's interpretations does no violence to the letter or the logic of either exception. To adopt UC's proposed interpretation, on the other hand, under the facts presented here, would contravene the Court's "[d]uty to adopt that construction which will save the statute from unconstitutional infirmity." *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407, 29 S.Ct. 527, 53 L.Ed. 2d 836 (1909). See also *Schneider v. Smith*, 390 U.S. 17, 26 and n.5, 88 S.Ct. 682, 19 L.Ed. 2d 799 (1968).

As Justice Brandeis explained in his concurring opinion in *Ashwander v. TVA*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936):

"When the validity of an act of Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

297 U.S. at 348, 56 S.Ct. 466, 80 L.Ed. 688 (quoting *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 76 L.Ed. 598 (1932)).

The question can be avoided here by following the interpretations advanced by the appellees and affirming the judgment of the California Court of Appeal.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be affirmed.

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1a

EXHIBIT A

ARTICLE 6

EXCLUSIVE REPRESENTATIVE'S RIGHTS

- 6.3 Intra-campus mail service shall be available to CFA at no cost for official CFA communications. CFA shall package and label materials for convenient handling according to the normal specifications of the campus, which shall be communicated upon request from CFA. The identifier "CFA" shall appear on all materials sent through the campus mail service by CFA. Faculty unit employee mailboxes, if any, may be utilized by CFA for purposes of CFA communication to faculty unit employees.

AMICUS CURIAE

BRIEF

MOTION FILED
OCT 21 1987

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No. 86-935

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
v. *Appellant,*
PUBLIC EMPLOYMENT RELATIONS BOARD, *et al.,*
Appellees.

On Appeal from the Court of Appeal
of the State of California,
First Appellate District

**MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*
AND BRIEF FOR THE NATIONAL EDUCATION
ASSOCIATION AND THE CALIFORNIA TEACHERS
ASSOCIATION AS *AMICI CURIAE*
IN SUPPORT OF APPELLEE**

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**MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*
FOR THE NATIONAL EDUCATION ASSOCIATION AND
THE CALIFORNIA TEACHERS ASSOCIATION
IN SUPPORT OF APPELLEE**

The National Education Association and the California Teachers Association move this Court for leave to file the accompanying brief *amici curiae* in support of appellee.

**INTEREST OF *AMICI CURIAE*
AND REASONS FOR GRANTING THE MOTION**

The National Education Association ("NEA") is a nationwide employee organization, with a current membership of some 1.8 million members, the vast majority of whom are employed by public educational institutions.

NEA operates through a network of affiliated organizations: it has state affiliates in each of the 50 states, the District of Columbia and Puerto Rico, and has approximately 12,000 local affiliates in individual school districts, colleges, and universities throughout the United States. The California Teachers Association ("CTA") is NEA's state affiliate in California.

One of the principal objectives of NEA and its affiliates is to secure improvements in the terms and conditions of employment of educational employees. Toward this end, they seek, pursuant to state public employee collective bargaining statutes, to organize such employees, become certified as their exclusive representative, and through collective bargaining represent them in dealing with their employers. In order properly to perform these functions, it is necessary for NEA and its affiliates to have an efficient and cost-effective method of communicating with the employees that they represent or seek to represent, and the employer's internal delivery system generally provides such a method.

In California, all employee organizations at public colleges and universities are by statute guaranteed the right to transmit representational material through the internal delivery system of the employer, and the precise issue before the Court in this case is whether such use is prohibited by the Federal Private Express Statutes. The situation in California is atypical, however: in most situations, access to the internal delivery system of the employer is limited to employee organizations that have been recognized as exclusive representatives, and must be achieved through collective bargaining. In these situations, NEA and its affiliates attempt to include in their collective bargaining agreements provisions giving them the right to use the employer's internal delivery system to transmit,

without charge, such material as may be necessary for them to perform their functions as exclusive representatives.

The United States Postal Service ("Service") has advised educational employers that the use of their internal delivery systems to carry material pursuant to such provisions violates the Private Express Statutes, and could subject them to civil and criminal penalties. Accordingly, many educational employers have denied such use to NEA and its affiliates, notwithstanding a contractual provision to the contrary.¹ If the Court reaches the merits of this case, its decision is likely to have ramifications for the use of internal delivery systems by unions that have been recognized as exclusive representatives. NEA and CTA have reason to believe that the parties will not adequately address this situation.

Moreover, because the controversy that gave rise to this case involved a union that no longer exists, there is a threshold question of mootness. NEA and CTA propose to address this question. It has not been addressed by appellant, and appellee has informed us that it does not consider the case moot, and will urge the Court to reach the merits.

Finally, because the union that was involved in the underlying controversy is defunct, the only parties participating in this appeal are the employer and the California administrative agency. As unions, NEA and CTA will provide the Court with a perspective that it might not otherwise have, and this perspective will be of assistance to the Court in its deliberations.

¹ NEA and certain of its affiliates are among the plaintiffs in an action that currently is pending against the Service in the United States District Court for the District of Columbia, challenging an attempt by the Service to prohibit several school districts in Florida from carrying the material of exclusive representatives to the employees that they represent. *National Education Association v. Bolger*, Civ. No. 82-2320 (D.D.C.).

CONCLUSION

For the foregoing reasons, the motion for leave to file the accompanying brief *amici curiae* should be granted.

Respectfully submitted,

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ADDENDUM TO MOTION

Pursuant to Supreme Court Rule 36, *amici* sought the consent of the parties to the filing of this brief. The University granted its consent; a copy of its letter to that effect has been filed with the Court. PERB, however, denied consent, because *amici* have taken the position, based on information provided to them by PERB, that this case is moot (see Brief Point I) -- a position with which PERB disagrees.

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**BRIEF FOR THE NATIONAL EDUCATION
ASSOCIATION AND THE CALIFORNIA TEACHERS
ASSOCIATION AS *AMICI CURIAE*
IN SUPPORT OF APPELLEE**

This *amici curiae* brief is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* is set forth in that motion.

SUMMARY OF ARGUMENT

This case has its genesis in a controversy between the University of California ("University") and the American Federation of State, County and Municipal Employees, Local 371, ("Local 371")—specifically, the refusal of the University to grant Local 371 access to the internal delivery system at its Berkeley campus to transmit certain material to employees that Local 371 was seeking to represent pursuant to the California Higher Education Employer-Employee Relations Act, Cal. Gov. Code, §§ 3568, *et seq.* ("HEERA"). The California Public Employment Relations Board ("PERB") concluded that this refusal violated HEERA, and ordered the University to grant the requested access to Local 371. The California Court of Appeal affirmed.

Local 371 became defunct in 1982. Inasmuch as the decision of PERB, and the remedial order implementing that decision, were keyed to the specific status, positions and activities of Local 371, this case is moot. (Point I)

If the Court reaches the merits of this case, it should hold that the carriage at issue, and the carriage of union letters by employers in certain other circumstances, is permissible under two statutory exceptions to the postal monopoly created by the federal Private Express Statutes, 39 U.S.C. §§ 601-06, 18 U.S.C. §§ 1691-97, 1725.

The first of these exceptions allows for the private carriage of letters that "relate . . . to the current business of the carrier." 18 U.S.C. § 1694. The University

asserts, relying on positions taken by the United States Postal Service ("Service"), that this exception applies only when the letters "belong to" the carrier—i.e., are sent to or from employees of the carrier acting in a representative capacity. This position is contrary to the plain language of Section 1694, the legislative history of Section 1694, and the decision of this Court in *United States v. Erie Railroad Co.*, 235 U.S. 513 (1915). There is only one prerequisite for the application of Section 1694: the letters must "relate . . . to the current business or the carrier." (Point II(A)(1)) This prerequisite is met when the union's letters are in implementation of its statutory responsibilities to represent employees. In *Perry Education Association v. Local Educators' Association*, 460 U.S. 37 (1983), the Court held that letters sent by an exclusive representative to the employees that it represents relate to the "official business" of the employer for First Amendment purposes; that holding forecloses the argument that such letters are not "related . . . to the current business" of the employer for purposes of the Private Express Statutes. (Point II(A)(2))

The carriage at issue here, and in certain other union/employer situations, also is permissible under the statutory exception for letters that are carried by "private hands without compensation." 18 U.S.C. § 1696(c). The Service, abandoning its own long-standing definition of the term "compensation," contends otherwise. But this position is contrary to the intent of Congress. As the relevant legislative history indicates, "compensation" exists for purposes of this exception only when the carriage is in exchange for money or identifiable goods or services in lieu of money. That is not the case here (where the obligation to carry Local 371's material was imposed upon the University by state law), nor is it the case when access to the employer's internal delivery system is secured through collective bargaining. (Point II(B))

ARGUMENT

I. BECAUSE THE CONTROVERSY THAT GAVE RISE TO THIS CASE INVOLVED A UNION THAT NO LONGER EXISTS, THE CASE IS MOOT.

The Court should not reach the merits of this case, but should dispose of it on a threshold question of mootness. We have been informed by PERB that Local 371 no longer exists: it became defunct in 1982.¹ We submit that this fact renders this case moot, and the Court should vacate the decision of the California Court of Appeal and remand the case to that court for appropriate further proceedings. In order to provide the proper context for our legal argument, it is necessary to begin with a review of the proceedings below, focusing particularly on the extent to which those proceedings were keyed to the specific status, positions, and activities of Local 371.

A. On November 16, 1979, William H. Wilson, as an individual and on behalf of Local 371,² filed an unfair practice charge with PERB, alleging that the University of California at Berkeley violated certain provisions of HEERA by denying him access to the University's internal delivery system. A-84.³ The charge did not assert a generalized right to distribute union material, but referred rather to specific material dealing with the activities and positions of Local 371 that Wilson sought to distribute to custodial employees on the Berkeley campus. See A-49.

After reviewing at length the unique circumstances involved in the dispute between the University and Local 371, *see, e.g.*, A-83, 84, 85, PERB, on November 25, 1981, issued a decision sustaining the unfair practice

¹ This fact is not reflected in the decisions below, or in any other part of the official record, but PERB intends to note it in its brief to the Court.

² Wilson was at that time the President of Local 371. Appendix to Jurisdictional Statement at A-84.

³ Citations in this form are to pages in the Appendix to the Jurisdictional Statement.

charge. PERB concluded that the University had violated HEERA "by denying the American Federation of State, County and Municipal Employees, Local 371, access to the University's internal mail system at the Berkeley campus," A-78, and it ordered the University to grant such access to Local 371. *Id.* In issuing its decision, PERB declined to address the University's argument that the claimed state statutory right was unenforceable by reason of preemptive federal postal law.

The University appealed PERB's decision to the California Court of Appeal, arguing, *inter alia*, that delivery of Local 371's material through the University's internal delivery system would violate the Private Express Statutes. On February 17, 1983, the court remanded the case to PERB because, in the court's view, "a factual issue remains to be decided by PERB," A-63, namely, whether the University's refusal to grant the requested access was "reasonable in light of all the surrounding circumstances, including federal postal requirements." A-63-64.

On March 18, 1983, in response to the remand order from the Court of Appeal, PERB assigned the case "to the Chief Administrative Law Judge to conduct a hearing for the purpose of taking additional evidence" with regard to certain factual issues, including "[t]o what extent are the materials charging party seeks to distribute 'letters' within the meaning of the federal postal regulations." A-57. *See* 39 C.F.R. § 310.1(a) (defining "letters"). The Chief Administrative Law Judge conducted a hearing and, based upon the evidence presented, made the requested findings of fact. A-53.

PERB then proceeded to consider whether the University's refusal to grant Local 371 access to its internal delivery system for the material in question was "reasonable" within the meaning of HEERA "in light of all the surrounding circumstances, including federal postal requirements." A-16. PERB's analysis in this regard was highly fact-specific, and in the course of its decision PERB made repeated reference to the evidence that had

been introduced regarding the status, positions, and activities of Local 371. *See, e.g.*, A-21, A-22, A-24.

With regard to the alleged conflict between HEERA and federal postal law, PERB examined the material that the charging party sought to transmit, and concluded that "[i]t is clear that, with the possible exception of union newsletters, all of the communications involved herein are 'letters' within the meaning of the Private Express Statutes." A-26. PERB held, however, that the requested delivery fell within several of the statutory exceptions to the general prohibition against the private carriage of mail. Accordingly, PERB held that the University's refusal to allow "AFSCME [Local 371] to use the internal mail system at the University of California, Berkeley . . . is unreasonable within the meaning of Section 3568." Consistent with this holding, PERB issued an order, the first paragraph of which directed the University to "CEASE AND DESIST" from "[d]enying AFSCME [Local 371] its rights under the Higher Education Employer-Employee Relations Act by refusing it access to the internal mail system." A-44. The order also directed the University to take certain "affirmative actions"—specifically, to "[g]rant AFSCME [Local 371] access to its internal mail system . . .", to "[m]eet with AFSCME [Local 371] to consider means by which any burden which may be caused by delivery of its mail through the internal mail system may be ameliorated," *id.*, and to post a notice which made specific reference to the findings in this case. A-46. This decision of PERB was appealed to, and affirmed by, the California Court of Appeal.

B. The starting point for our legal analysis is the familiar proposition that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *Local No. 8-6, Oil Chemical and Atomic Workers Intern. Union v. Missouri*, 361 U.S. 363, 367 (1960). To be cognizable in a federal court, a case "must be definite and concrete, touching the

legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). Although, as a matter of state law, a case might be saved from mootness by the public interest in the continuing issue raised by the appeal, the fact remains that "[e]ven in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction." *North Carolina v. Rice*, *supra*, 404 U.S. at 246. And "[t]he usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe v. Wade*, 410 U.S. 113, 125 (1973).⁴

When the foregoing principles are applied to the instant case, there seems little doubt that it is moot. As our review of the proceedings below indicates, PERB (and in turn the California Court of Appeal) resolved a specific controversy between Local 371 and the University. Its decision—and the remedial order implementing that decision—established the respective legal rights and obligations of those two parties *vis-a-vis* each other, and have no continuing effect in light of the fact that Local 371 now is defunct. In short, there is no longer an "actual controversy," and the outcome of this proceeding "cannot affect the rights of litigants."

Inasmuch as the mootness question presumably was not raised in the proceedings below, it is not addressed in the decision of PERB or the California Court of Appeal. Accordingly, we can only speculate as to the arguments that may be made by one or both of the parties in

⁴ Although neither party has urged that this case is moot, resolution of the question is essential "if federal courts are to function within their constitutional sphere of authority." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

response.⁵ In order to assist the Court in this regard, we discuss below the possible arguments that occur to us.

1. The unfair practice charge on which this case is bottomed was not filed by Local 371, but by "William Wilson, as an individual and on behalf of the American Federation of State, County and Municipal Employees, Local 371," A-15, and Wilson presumably is still a party to this proceeding.⁶ But this technical distinction cannot save this case from mootness.

In its decision, PERB made no bones about the fact that the controversy was between Local 371 and the University, and its remedial order reflects this same organizational focus. A-43. The California Court of Appeal likewise viewed this case as involving a controversy between Local 371 and the University, and at several points in its decision characterized the unfair practice charge as "the union's," A-61; *see also* A-6.

Perhaps more pertinent to the question of whether there still is an actual controversy in this case, however, is the fact that Wilson did not in the unfair practice charge assert any claim independent of his relationship with Local 371, or of the relationship between Local 371 and the University. To the extent that there ever was an actual controversy between Wilson as an individual and the University, it involved his right under Section 3571(a) of HEERA to use the University's internal delivery system to transmit materials of Local 371. Inasmuch as Local 371 no longer exists, the question of whether he as an individual has a statutory right to have the University carry its materials is moot, and whatever more generalized statutory right Wilson may have to transmit

⁵ Counsel for PERB has indicated that PERB does not consider this case moot, and will urge the Court to address its merits.

⁶ Although Wilson is identified by the University as an appellee, he does not appear to have served with any of the papers filed by the University, nor to our knowledge has he in any way participated in this appeal.

the materials of other employee organizations has never been at issue in this case.

2. PERB found that, because the University's refusal to carry the material of Local 371 was "unreasonable within the meaning of section 3568," it had "violated subsection 3571(a) and, derivatively, subsection 3571(b) of" HEERA. A-43 (emphasis added). Unlike section 3568 and subsection 3571(b), subsection 3571(a) is concerned with individual, as opposed to organizational, rights, providing in relevant part that it "shall be unlawful for the higher education employer to interfere with, restrain or coerce employees because of their exercise of rights guaranteed by this chapter." A-115. PERB does not indicate precisely which individual rights were violated by the University's refusal to carry the material of Local 371. If the reference is to Wilson's right as an individual to transmit such material, we already have explained why that right is of no further practical significance. If, on the other hand, the reference is to some general statutory right of other employees to *receive* material from employee organizations, that right would in the circumstances of this case extend only to the material of Local 371 that was identified in the unfair practice charge. And, for the reasons stated previously, the demise of Local 371 would render moot any dispute *vis-a-vis* this particular right to receive.

3. In an effort to demonstrate that there still is an actual controversy, perhaps the focus will be placed on Section A(2) of the order issued by PERB in conjunction with its October 18, 1984 decision (and the counterpart section in the accompanying notice that the University was required to post). Although this order in all other respects relates specifically to Local 371, Section A(2) is cast in broader terms, and directs the University to cease and desist from:

Denying employees their rights under the Higher Education Employer-Employee Relations Act by refusing *employee organizations* access to its internal mail system.

A-44 (emphasis added.) This section, the argument would run, is not limited to material of Local 371, but is rather a broad injunction which would be violated if the University denied *any* employee organization access to its internal delivery system. This argument should be summarily rejected.

Although PERB has the authority to issue broad remedial relief (*see* Cal. Gov. Code § 3563.3), we find nothing in the record of this case to even remotely suggest that PERB intended, by this single statement in a lengthy decision that otherwise is entirely keyed to the particular dispute between Local 371 and the University, to subject the University to the possibility of a contempt proceeding if, in the future, it refused to allow *other* employee organizations to use its internal delivery system to transmit *other* material under *other* circumstances. While the decision in this case might well be a compelling precedent if an unfair practice charge subsequently were filed against the University by another employee organization, it could not properly provide the basis for subjecting the University to a contempt proceeding.⁷ Accordingly, the reference in Section A(2) of PERB's order to "employee

⁷ Indeed, if PERB were to so construe the order, it is likely that the California courts would, applying basic principles of equity, refuse to enforce it. The appropriate rule was set forth by this Court, when, in commenting on the analogous remedial power of the National Labor Relations Board, it stated:

[T]he mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. This Court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus disassociated from those which a defendant has committed.

National Labor Relations Board v. Express Pub. Co., 312 U.S. 426, 435-36 (1941).

organizations" (rather than to Local 371) is not sufficient to save this case from mootness.⁸

II. IF THE COURT REACHES THE MERITS, IT SHOULD HOLD THAT THE STATUTORY EXCEPTIONS TO THE GENERAL PROHIBITION AGAINST THE PRIVATE CARRIAGE OF LETTERS PERMIT AN EMPLOYER, IN THE CIRCUMSTANCES OF THIS CASE AND IN CERTAIN OTHER CIRCUMSTANCES, TO CARRY UNION LETTERS DEALING WITH LABOR RELATIONS.

The Private Express Statutes contain a general prohibition against the private carriage of "letters" over established postal routes unless proper postage has been paid (*i.e.*, the letters must be stamped and the stamps cancelled). There are, however, certain statutory exceptions to this prohibition, two of which are dealt with in this brief. Carriage outside of the mails is permitted if the letters "relate . . . to the current business of the carrier," or if the carriage is "by private hands without compensation." Although the narrow issue before the

⁸ Section B(3) of PERB's order directed the University "[w]ithin 35 days of the date that this Decision is no longer subject to consideration, [to] post . . ." the notice attached to the order, and to "report to the San Francisco Regional Director of the Public Employment Relations Board of the actions taken to comply with this Order." A-44-45. Inasmuch as the record does not indicate that PERB's order was stayed pending appeal, we assume that these directives have been complied with, and are, therefore, irrelevant to the question of mootness *vel non*.

If this assumption is incorrect, however, and the foregoing directives have not been complied with, there might be an actual controversy between PERB and the University if, as a matter of state law, the University still is under an obligation to post and report, notwithstanding the fact that Local 371 no longer exists. We can find nothing in the regulations of PERB or reported California law to indicate whether this obligation survives. Accordingly, if these ministerial directives have not already been complied with, and if the Court concludes that the University's obligation to do so would be sufficient to save this case from mootness, it should vacate the decision of the California Court of Appeal, and remand the case to that court to resolve this open question of state law.

Court in this case is whether the specific use of the University's internal delivery system that has been ordered by PERB comes within one or both of those statutory exceptions, the case presents a broader issue. The University seeks to justify its refusal to grant access to Local 371 on the basis of positions taken by the Service, which in effect establish a *per se* rule prohibiting employer carriage of union letters. As the Service put it in the advisory opinion sent to the University in this case:

[T]he carriage by an employer of the letters of an organization of its employees is *on its face* a violation of the statutes and is not justified by any of the statutory exceptions to their general prohibition.

PES No. 82-9, A-68 (emphasis added).

The present brief is concerned primarily with this broader issue. Our objective is to demonstrate that there is no basis for the type of categorical prohibition against the carriage of union letters by an employer that the Service urges.

A. The Exception for Letters That "Relate . . . to the Current Business of the Carrier".

1. In 1909, Congress amended what is now section 1694 to provide that letters which "relate . . . to the current business of the carrier" are exempt from the postal monopoly. The Conference Report to the House of Representatives offered the following comment with regard to the amendment:

The insertion of the words 'to the current business of the carrier' permits a common carrier to which a mail coach is attached to transmit by its servants to other stations on its route communications not enclosed in the mail, if such communications are confined to the carrier's business.

43 Cong. Rec. 3789-90 (60th Cong., 2d Sess., March 3, 1909). As this excerpt makes clear, the purpose of the amendment was straightforward: it permitted private carriage "if such communications are confined to the carrier's business."

The Attorney General, in an opinion letter written in 1910, attempted to rewrite the legislative history. Ignoring the clear language of both the statute and the Conference Report, the Attorney General stated:

[I]t was not the intention of Congress to . . . permit[] free transportation of letters and packets belonging to railroads or persons other than the carrier even though such letters or packets might relate to the current business of the carrier.

Congress did not mean to do more than to permit carriers themselves to carry *their own messages*, and particularly corporate carriers to carry their own messages, *which would necessarily be limited to their business . . .*

28 Op. A.G. 537, 541-42 (emphasis added).

The Attorney General reiterated this position in even stronger terms two years later, opining that:

Congress has imposed *two* conditions upon the free transportation of letters outside the mail: First, *that the letters should be the letters of the carrier itself*; and second, that they should relate to its own current business. The concurrence of both these conditions is essential to the privilege.

29 Op. A.G. 418, 419 (1912) (emphasis added).

The Attorney General's view of the "business of the carrier" exception was flatly rejected by the Court in *United States v. Erie Railroad Co.*, 235 U.S. 513 (1915). The facts in *Erie* were as follows.

The Erie Railroad ("Railroad") and the Western Union Telegraph Company ("Western Union") entered into a contract, pursuant to which Western Union operated certain telegraph lines over the Railroad's right of way. Under the contract, the lines were to be used for both Western Union's commercial telegraph business and for the Railroad's business (*i.e.*, communications from station to station about train schedules, etc.). The contract provided that the Railroad would maintain, at its expense, telegraph offices at all stations en route, and

would pay the salaries of agents who would serve both as stationmasters for the Railroad and telegraphers for Western Union. The telegraph operation was under the direction of a Superintendent of Telegraph, who functioned as the joint agent of, and was paid jointly by, the Railroad and Western Union. In return for providing offices, agents, and access, the Railroad received 25% of the gross revenues of Western Union's commercial telegraph business, and free use of its telegraph lines for the Railroad's business. At all times, the Railroad and Western Union remained discrete entities, and the Railroad was in no sense an "owner" of Western Union's commercial telegraph business.

In June, 1912, the Superintendent of Telegraph sent two unstamped letters to a station agent. Both letters, which were carried by the Railroad, concerned the profitability of Western Union's commercial telegraph business. The Railroad was indicted for carrying these letters in violation of the Private Express Statutes, and the issue before the Court was whether the carriage could be justified under the "business of the carrier" exception. In contending that the answer to this question was no, the government took the position that the statutory exception should be construed narrowly, so as to further the purpose of Congress, "which was to establish a monopoly of the carriage of the mails." *Erie*, 59 L.Ed. 335, 336. The Court disagreed, and held that the letters came within the statutory exception. The Court's holding was not predicated on a finding that the letters at issue "belonged to" the Railroad (*i.e.*, that they were sent by or to an employee of the Railroad in his capacity as such). As the Court construed the contract between the Railroad and Western Union, the Superintendent of Telegraph and the station agent were acting in their capacity as employees of Western Union—not as employees of the Railroad—when sending or receiving letters about the profitability of Western Union's commercial telegraph business. 235 U.S. at 518-20. Nor did the Court conclude that the Railroad and Western Union were a single entity. To the

contrary, it expressly acknowledged their separate identities, but found that the interest of the Railroad in the profitability of Western Union was sufficient basis for the applicability of the "business of the carrier" exception:

[W]hile it may be said that there is a railroad business in which the telegraph company has no concern, that is, business distinctly railroad, yet it is also so far concerned with the telegraph business as to make its efficient and successful operation of interest to it. To promote such operation was the purpose of the two letters which are the basis of the indictment, and the business comes within the description of the statute and is "current."

[T]his conclusion . . . is one justified by the words of the statute and in view of the facts by its history, and is not precluded by anything that was said at the time the act was amended.

235 U.S. at 520.

In sum, the Court held that the "business of the carrier" exception means explicitly what it says: it exempts letters relating to the carrier's business, whether or not they belong to—i.e., are sent to or received by employees of—the carrier.

Despite the clear import of *Erie*, the Service has continued, in its regulations and advisory opinions, to treat the "business of the carrier" exception as though it contains an independent requirement that the letters belong to the carrier. Thus, the Service's regulation interpreting the exception reads as follows:

Letters of the carrier. The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the individual actually carrying the letters is not the person sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person . . . and the letters must relate to the current business of such person.

39 C.F.R. § 310.3(b)(1), A-110. The primary focus of this regulation is on the question of whether the letters belong to the carrier. That question is to be answered by determining whether the letters were sent or received on the carrier's behalf, which depends, in turn on the existence of an employment relationship between the carrier and the sender or recipient of the letter.⁹ The sole *statutory* requirement—that the letters "relate to . . . the current business of the carrier"—is reduced to an afterthought.¹⁰

The advisory opinions issued by the Service are in accord with the regulation, and they likewise distort the intent of the "business of the carrier" exception. Thus, for example, in PES No. 76-4 Reconsidered, the Service concluded that letters sent by a union to employees of a public school district for whom it had been recognized as the exclusive representative pursuant to a state statute, do not fall within the exception:

[W]e think it clear that inter-related though their activities and goals may be, the District and the

⁹ Apparently recognizing the tension between the regulation and *Erie*, the Service attempts to harmonize the two by providing a "joint enterprise" exception in a subsequent section of this regulation. See 39 C.F.R. § 310.3(b)(3), A-110. But, as we have shown, the decision in *Erie* was not predicated on the joint nature of the Railroad/Western Union enterprise.

¹⁰ PERB, and the California Court of Appeal, accepted the position taken in the regulation that the "business of the carrier" exception entails a requirement that letters be sent or received by employees of the carrier, but took issue with the Service's further contention that the exception requires that the employees be acting as *agents* or *representatives* of the employer. In our view, an "employment" requirement has no greater justification in the statute than does an "agency" requirement, and, accordingly, we make no effort to demonstrate that the letters at issue in the instant case, or in other situations discussed in this brief, meet the requirements set forth in 39 C.F.R. § 310.3(b)(1). It is our position that the regulation is, on its face, inconsistent with section 1694.

Association are legally distinct entities in every sense, and the Association's letters to its members can in no sense be regarded as sent by or addressed to the carrier-District, and the exception is therefore inapplicable.

Id. at 5.

The conflict between the position taken by the Service in this advisory opinion, and the position taken by the Court in *Erie*, hardly could be clearer. In *Erie*, the Court concluded that letters carried by one legally distinct entity (the Railroad) for another legally distinct entity (Western Union)—letters which were written by and to individuals functioning as employees of the non-carrier entity (Western Union)—fell within the “business of the carrier” exception because the “interest[s],” *Erie*, 235 U.S. at 520 (i.e., activities and goals,” PES No. 76-4 Reconsidered) of the two entities were *inter-related*. In the above-quoted advisory opinion, the Service ignored the factor that was dispositive in *Erie*, and found against the union on the basis of factors which were treated in *Erie* as irrelevant.¹¹

While an agency's interpretations of its operative statute normally are entitled to judicial deference, it is neither necessary nor proper for a court to defer to an agency interpretation that is wholly without support in the history and plain meaning of the statute:

The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make

¹¹ The Service has taken the same position in the advisory opinion sent to the University in the instant case, see PES No. 82-9, J.S. A-73 (quoting PES No. 76-4 Reconsidered), and in other advisory opinions. See, e.g., PES No. 82-10 at 9 (“We consider it safe to conclude that [the Manatee Education Association] and the School Board are wholly distinct entities and despite their common interest in the operation of the public schools in Manatee County, letters from the union to members of the bargaining unit cannot be said to be ‘on the current business of’ the School Board” (emphasis added)).

law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134 (1936). Although we are prepared to dismiss as gross overstatement the assertion by the United States in its *amicus* brief that the construction of the “business of the carrier” exception urged here would “diminish substantially the scope of the postal monopoly, resulting in increased cost to the public or a less efficient postal system,” United States’ *Amicus Brief* at 2,¹² we submit that even if there were some potential for such a result, it would not be sufficient to justify the Service’s attempt to rewrite the statute. As the Court explained in *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681, 689 (1986), an

¹² When Congress enacted the forerunner of the current version of the Private Express Statutes in 1845, it was concerned with entrepreneurial competitors of the postal system, see *A Report by the Board to Governors To the President And the Congress, Pursuant to Section 7 of the Postal Reorganization Act* (June 29, 1973) (“Report”) at 59, and as recently as 1973, the Board of Governors of the Service concluded that the prohibition against the private carriage of mail should remain in force to prevent “cream-skimming”—private businesses established to serve the more lucrative postal routes at costs lower than the Service’s costs. Report, 3-11. The competing entities identified by the Board of Governors in reaching this conclusion were independent commercial delivery systems, common carriers (such as airlines, bus lines and trains), public utilities and commercial courier services. Report, 71-86. There was no mention in the report of the internal delivery systems of school districts, colleges, and universities, or anything even remotely comparable. Reflective of this view, virtually all civil actions that to date have been brought to enforce the Private Express Statutes have involved commercial entities engaged in segmented cream-skimming. See, e.g., *United States v. Black*, 569 F.2d 1111 (9th Cir.), cert. denied, 435 U.S. 944 (1978); *United States Postal Service v. Brennan*, 574 F.2d 712 (2d Cir. 1978), cert. denied, 439 U.S. 1115 (1979); *National Association of Letter Carriers v. Independent Postal System of America, Inc.*, 470 F.2d 265 (10th Cir. 1972).

agency charged with enforcing a regulatory statute is not free to narrow statutory exceptions on the basis of the agency's view that doing so would better serve the general purposes of the statute:

Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. . . .

. . . The statute may be imperfect, but the [agency] has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rule-making power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.

See also *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *United States v. Larionoff*, 431 U.S. 864, 873 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976); *Dixon v. United States*, 381 U.S. 68, 74 (1965).

The Court, in short, should interpret section 1694 as it is, not as the Service wishes it were. And there is nothing in the statute—just as there was nothing in the statute when the Court decided *United States v. Erie Railroad Co.*—even remotely to suggest that whether letters "belong to" the carrier is determinative of whether they "relate . . . to the current business of the carrier." We turn now to the analytical framework that should be used in making the latter determination.

2. The question of whether union letters relate to the employer's current business is, at bottom, a question of federal law. But here, as in many other instances, federal law is "interstitial" and "builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose." *Hart & Wechsler's The Federal Courts and the Federal System* at 470-71 (2nd ed. 1973). In the 1910 opinion discussed previously, see p. 12, *supra*, the Attorney General acknowledged the application of this prin-

ciple to the "business of the carrier" exception. Thus, he opined that when state law imposes a duty upon a carrier, "the fulfillment of the duty thus imposed is clearly a part of the 'current business of the carrier' within the terms of the statute." 28 Op. A.G. 537, 539 (1910). This is the same Attorney General's opinion on which the Service has otherwise relied so heavily, but the Service has chosen to disregard the opinion in this regard. Although noting that the carriage in this case "is not voluntarily undertaken by the university but is an obligation said to be imposed upon it by state law," PES. No. 82-9, at 5, A-71 (emphasis added), the Service nonetheless concluded that the carriage of Local 371's material was not part of the "current business" of the University.

But we need not rely on the 1910 opinion of the Attorney General (which, as we have shown, is in other respects flawed) to demonstrate that letters sent by a union to the employees that it represents or seeks to represent "relate . . . to the current business" of the employer. The decision of the Court in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), provides a far more recent—and authoritative—precedent.

As previously noted, the facts in the instant case are somewhat atypical, in that access to the internal delivery systems of public colleges and universities in California is statutorily guaranteed to all employee organizations. In most states, and other than in public sector higher education in California, such access can be obtained only through collective bargaining by a union that has been recognized as an exclusive representative. This was the factual situation presented by *Perry*.

In *Perry*, the Court held that the First Amendment rights of a minority union ("PLEA") were not infringed by a provision of a collective bargaining agreement which allowed the exclusive representative of the school district's teachers ("PEA") to use the employer's internal

delivery system to communicate with the teachers it represented, and denied such use to PLEA. The fulcrum of the Court's opinion is its finding that "the internal mail system is not a public forum," and that the school district could, therefore, "restrict use to those who participate in the forum's official business." *Id.* at 53. The dissent in *Perry* argued that because "the School Board neither monitors nor endorses [PEA]'s messages, [and it is therefore] difficult to consider [PEA] an agent of the Board," PEA's messages could not properly be viewed as the "official business" of the school district. *Id.* at 69 n.10 (Brennan, J., dissenting). The Court disagreed. In holding that the letters sent by an exclusive representative do relate to the "official business" of the school district, it reasoned as follows:

Use of school mail facilities enables PEA to perform effectively its obligations as exclusive representative of all Perry Township teachers. Conversely, PLEA does not have any official responsibility in connection with the school district and need not be entitled to the same rights of access to school mailboxes. We observe that providing exclusive access to recognized bargaining representatives is a permissible labor practice in the public sector. We have previously noted that the "designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." *Aboud v. Detroit Board of Ed.*, 431 U.S. 209, 221 (1977).

As we have already stressed, when government property is not dedicated to open communication the government may—without further justification—restrict use to those who participate in the forum's official business.

We agree that the mail service could be restricted to those with teaching and operational responsibility

in the schools. But, by the same token—and upon the same principle—the system was properly opened to PEA, when it, pursuant to law, was designated the collective bargaining agent for all teachers in the Perry Schools. *PEA thereby assumed an official position in the operational structure of the District's Schools*, and obtained a status that carried with it rights and obligations that no other labor organization could share.

The Court of Appeals refused to consider PEA's access justified as "official business" because the School District did not "endorse" the content of its communications. We do not see the necessity of such a requirement. PEA has official duties as representative of Perry Township teachers. In its role of communicating information to teachers concerning, for example, the collective bargaining agreement and the outcome of grievance procedures, PEA neither seeks nor requires the endorsement of school administrators. The very concept of the labor-management relationship requires that the representative union be free to express its independent view on matters within the scope of their representational duties. *The lack of an employer endorsement does not mean that the communications do not pertain to the "official business" of the organization.*¹³

Id. at 50-53, n.9, n.10 (emphasis added).

Although Local 371 was not an exclusive representative, it was nonetheless "participat[ing] in the [Univer-

¹³ As the University correctly observes, the Court in *Perry* "declined to reach [the] issue" of whether the "carriage of union letters in a school's internal mail system violated the Private Express Statutes," Brief for Appellant at 10, n.2, but this observation begs the question. The University does not suggest—nor could it—that the analytical framework used by the Court for First Amendment purposes in *Perry* to determine whether union letters relate to the "official business" of the school district is any different than the framework which should be used to determine for purposes of the Private Express Statutes whether union letters "relate . . . to the current business of the carrier."

sity's] official business," *Perry, supra*, 460 U.S. at 53. As the California Court of Appeal noted, HEERA expresses a finding that "[t]he people of the State of California have a fundamental interest in the development of harmonious and cooperative labor relations between the public institutions of higher education and their employees," A-9, and it seeks

to accomplish this purpose by providing a uniform basis for recognizing the right of the employees of these systems to full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of representation in their employment relationships with their employers and to select one of such organizations as their exclusive representative for the purpose of meeting and conferring.

Id. (quoting from Cal. Gov. Code § 3560).

In sum, the Service simply is wrong in asserting that carriage by an employer of union letters *never* can be justified under the statutory exception for letters that "relate . . . to the current business of the carrier." When, as in the instant case, a union seeks to transmit letters to employees that it seeks to represent—and, *a fortiori*, when an exclusive representative seeks to transmit letters to employees that it does represent—the carriage of such letters by the employer does not violate the Private Express Statutes.

B. The Exception for Letters That Are Carried By "Private Hands Without Compensation".

18 U.S.C. § 1696(c) provides, in pertinent part, that the Private Express Statutes:

[s]hall not prohibit the conveyance or transmission of letters or packets by private hands without compensation.

The determinative question, then, is whether, and under what circumstances, an employer's carriage of union

letters can be viewed as "without compensation."¹⁴ The Service contends that the answer to this question is

¹⁴ Before addressing this question, it is appropriate to deal with the University's threshold argument that "Publicly Funded Carriage of Mail by a Government Agency is not Carriage by 'Private Hands'" Brief for Appellant at 31. This argument, which is notably absent from the *amicus* brief filed by the United States, is totally without merit. We are aware of no advisory opinion issued by the Service prior to the July 2, 1982 advisory opinion sent to the University in this case, in which the governmental character of the employer even was mentioned as relevant to the applicability of this exception. To the contrary, in at least one advisory opinion, PES 77-8, the Service concluded that the "private hands without compensation" exception applied to a public school district which, like the University, is a publicly funded governmental entity.

On page 33 of its brief, the University makes reference to a Service regulation which provides:

'Private carriage', 'private carrier', and terms of similar import used in connection with the Private Express Statutes or these regulations mean carriage by anyone other than the Postal Service, regardless of any meaning ascribed to similar terms under other bodies of law or regulation.

39 C.F.R. § 310.1(e). Recognizing the clear implication to be drawn from this regulation, the University specifically rejects the suggestion that the phrase "private hands" should, on the basis of this regulation, be construed to mean "non-Postal Service hands." The University asserts that this construction "would make the use of the phrase 'private hands' superfluous in the very regulation in question", and contends that "the statute simply could have provided that 'the conveyance or transmission of letters or packets without compensation' is not prohibited." Brief at 33-34. We by no means are prepared to reject the notion that the phrase "private hands" does, indeed, mean "non-Postal Service hands." In support of this construction we note that, although the phrase has been included in the Private Express Statutes since their original enactment in 1845, the regulations of the Service have never treated it as having independent meaning.

But it is unnecessary for present purposes to argue that "private hands" means "non-Postal Service hands" in order to dispose of the University's argument that the inclusion of governmental entities would make the phrase superfluous, University's Brief at 33, or its related argument that a broad reading of the exception (to cover,

"never," and it bases this answer on a definition of the term "compensation" that is contrary to its own prior position, the intent of Congress, and indeed, logic.

Until recently, the carriage at issue in this and similar union/employer cases would, under Service regulations, clearly have been viewed as "without compensation." Thus, the regulation that existed in 1974 provided that:

The sending or carrying of letters is permissible if no charge for carriage is made by the carrier. However, a person engaged in the transportation of goods or persons for hire does not fall within the exception merely by carrying letters free of charge for customers whom he does charge for the carriage of goods or persons.

39 C.F.R. § 310.3(c) (1974) (emphasis added). In a 1976 advisory opinion purporting to apply the 1974 regulation, however, the Service stated that a school district received "compensation" for delivering union letters solely because the agreement to deliver was reached through collective bargaining. See PES No. 76-4 at 2.

Apparently recognizing that the 1974 regulation—which required only that no charge be made for the carriage—did not support the position taken in this advisory opinion, the Service responded to a request for reconsideration

for example, railroads) would be "difficult to square with Congress' amendment in 1909 codifying the letters-of-the-carrier exception." *Id.* at 34. To the extent Congress intended for this phrase to have independent exclusionary effect, its concern appears to have been with common carriers. Thus, in an opinion issued in 1896, the Attorney General expressed the view that "'private hands' was evidently intended to cover all except common carriers on post routes." 21 Op. A.G. 394, 401 (1896). This view finds some support in the Congressional debates that led to the adoption of the "business of the carrier" exception. Senator McLaurin suggested an alternative amendment to the statute—one that would provide that only carriage of letters "for compensation" or "for hire" was to be restricted. See 42 Cong. Rec. 1902, 1905, 1908 (60th Cong. 1st Sess. Feb. 12, 1908). This amendment would have been unnecessary had the already existing "private hands without compensation" exception been viewed as applicable to common carriers.

tion of PES No. 76-4 by revising the regulation to fit its new theory. In 1979, while the request for reconsideration still was pending, the Service repromulgated the regulation to read as follows (which is its present form):

The sending or carrying of letters without compensation is permitted. *Compensation generally consists of monetary payment for services rendered. Compensation may also consist, however, of non-monetary valuable consideration and of good will. Thus, for example, when a business relationship exists or is sought between the carrier and its user, carriage by the carrier of the user's letter will ordinarily not fall under this exception; or when a person is engaged in the transportation of goods and persons for hire, his carrying of letters 'free of charge' for customers whom he does charge for the carriage of goods or persons does not fall under this exception.*

39 C.F.R. § 310.3(c) (1979), A-110 (emphasis added). In PES 76-4 Reconsidered, which was not issued until 1982, the Service, relying on the new regulation that it had tailor-made for the task at hand, reaffirmed the position that it previously had taken. "[W]hen the carriage of letters is included as one of several items in an arrangement such as a collective bargaining agreement, even though no specific consideration is assigned to that item," the Service declared, compensation is present. *Id.* at 4.

Nor has the Service viewed the existence of a collective bargaining agreement as a *sine qua non* for the finding of "compensation" in the union/employer context. In PES No. 76-17, for example, the Detroit School District delivered union letters in the absence of a contractual obligation to do so, but the Service nonetheless found compensation. It reasoned as follows:

[T]he delivery service rendered for the unions clearly constitute a term or condition of employment, in the form of a consideration to the unions. In return for this and other considerations, the Detroit School Board receives legal consideration from the unions, namely, the services of the persons whom

the unions represent, and also the good will of the unions.

Id. at 8 (emphasis added).¹⁵

And, of course, the Service goes even further in this case. Dispensing with the need for "good will," "a business relationship," or even "legal consideration," the Service finds "compensation" notwithstanding the fact that "the carriage is not voluntarily undertaken by the university but is an obligation said to be imposed upon it by state law." PES No. 82-9, A-71.

Although, as previously noted, an agency's interpretation of its own operative statute generally is entitled to some deference by the courts, *Udall v. Tallman*, 380 U.S. 1 (1965), the Court has recognized that:

A 'settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.' . . . Accordingly, an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Insurance Co., 463 U.S. 29, 41-42 (1983) (quoting *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973)).

We certainly do not mean to suggest that there are no situations in which an agency properly may, and indeed should, change an existing interpretation. Thus, an agency, in the exercise of its special expertise, may conclude that changed circumstances make the reinterpretation of a statute necessary in order to ensure the con-

¹⁵ Although this advisory opinion pre-dates the Service's promulgation of the 1979 regulation, it post-dates PES No. 76-4, which marked the shift in policy which the Service sought to justify through the 1979 regulation.

tinued implementation of the intent of Congress. Or Congress, through its own actions, may suggest to an agency that there is a need to alter an existing interpretation. See, e.g., *Airline Pilots Association v. Department of Transportation*, 791 F.2d 172, 175 (D.C. Cir. 1986). In these situations, changes—even sudden changes—may be appropriate. But neither rationale applies here.

The Service did not in 1976, when it issued PES No. 76-4, or in 1979, when it repromulgated the interpretative regulation, or at any other time, identify any changed circumstance which warranted a revised interpretation of the term "compensation," and, indeed, there was no such changed circumstance. And far from indicating a need for reinterpretation, the actions of Congress suggested precisely the contrary. In a 1973 Report to Congress, the Service recommended that the prohibition in the Private Express Statutes against the private carriage of letters be neither relaxed nor strengthened. See *A Report by the Board of Governors To the President And the Congress, Pursuant to Section 7 of the Postal Reorganization Act*, 59 (June 29, 1973). Although Congress heeded this recommendation, the Service ignored its own advice by attempting, through its regulations and advisory opinions, to narrow the "without compensation" exception. In short, the usual deference that is accorded to agency interpretations is not appropriate here.

The only clear guidance from Congress as to what would turn free carriage into carriage for compensation comes from remarks made by Senators Sutherland and McLaurin in 1908 when the "business of the carrier" exception now embodied in 18 U.S.C. § 1694 was under consideration. During the debate on that exception, Senator McLaurin proposed as an alternative a "without compensation" amendment. 42 Cong. Rec. 1902, 1905, 1908 (60th Cong., 1st Sess., Feb. 12, 1908), explaining that the postal monopoly is not generally threatened by private carriage that is not "for the purpose of making money." 42 Cong. Rec. 1905 (60th Cong., 1st Sess. Feb. 12, 1908) (emphasis added). Thereafter, Senator Suther-

land asked Senator McLaurin whether an agreement between two railroads pursuant to which each would carry the other's mail would be for compensation. Senator McLaurin responded that it would:

[I]f they were to make an arrangement of that kind, it would itself be for compensation. It would be a quid pro quo and it would violate the law.

.

If I give a man my services for services of his in return, I am compensated for my services and so is he for his services.

Id. Although the amendment did not pass, the debate indicates that Congress understood "compensation" to mean the payment of money or the exchange of *identifiable* goods or service in lieu of money.¹⁶ Consistent with this understanding, we are aware of no action—administrative, judicial or legislative—between 1845 and 1976 in which the Private Express Statutes have been applied to prevent the private carriage of letters in the absence of an exchange of money or identifiable goods or services for the carriage.¹⁷

¹⁶ As the United States correctly points out in its *amicus curiae* brief at 27 n.11, Senator McLaurin also expressed concern that the Private Express Statutes not be used to prosecute a person "when, out of the goodness of his heart, he was trying to do a favor for some friend," 42 Cong. Rec. 1905. See also Brief for Appellant at 31-32. But there is nothing in the record of the debates to suggest that in offering this example, Senator McLaurin in any way intended to define the outer limits of the exception.

¹⁷ *United States v. Thompson*, 28 F. Cas. 97 (D. Mass. 1846), is not to the contrary. The issue in *Thompson* was whether a common carrier of goods for a price could carry letters sent by a shipper of goods if there was no additional charge for carrying the letters. Obviously, this carriage was not "without compensation," since a carrier easily could evade the law by setting a rate for the shipment of goods which was high enough to compensate it for carriage of the letters as well. Alternatively, a carrier whose true purpose was to carry letters, not goods, could effectively evade the Private Express Statutes by requiring that a small, symbolic package be shipped as a condition of carrying letters which were the principal items it carried.

There certainly was no such exchange in this case. And there may or may not be such an exchange in other union/employer situations, but the determination properly must be made by looking to the actual relationship between the parties, and not, as the Service suggests, on the basis of categorical assumptions about the nature of labor relations.¹⁸

CONCLUSION

For the foregoing reasons, the Court should:

1. Hold that this case is moot, vacate the decision of the California Court of Appeal and remand the case to that court for appropriate further proceedings; or

¹⁸ In the advisory opinion that it sent to the University in this case, the Service rejects the proposition that compensation must flow from the sender to the carrier, and suggests that the "private hands without compensation" exception is not applicable here because "the state, through the appropriation of public funds, furnishes a major portion of the university's income." PES No. 82-9, A-72. (The University expands upon this argument in its brief, see pages 38-39; the United States in its *amicus* brief ignores it.) This argument is flawed in several respects. To begin with, the legislative history discussed in text, which reflects a concern with the possibility of reciprocal arrangements between railroads and other carriers, indicates that Congress intended for this exception to apply unless the carriage involves an exchange of money or identifiable goods or services *between the carrier and the sender*. Moreover, the Service traditionally has focused on the relationship between the carrier and the sender, and prior to its advisory opinion in this case, has required that the carrier receive *from the sender* something that could be characterized, however loosely, as a *quid-pro-quo*. See, e.g., PES No. 76-4 Reconsidered at 4; PES No. 76-12 at 2-3; PES No. 76-15 at 3.

But even if we assume, *arguendo*, that there is some merit to the contention that there need not be a direct-line financial relationship between the carrier and the sender, this exception would in any event apply under a proper definition of "compensation" unless there were an identifiable connection between the money, goods, or services, "whatever the source," University's Brief at 38, and the carriage. This connection does not exist when, as here, the alleged compensation is included as part of an overall budget, which does not contain any funds specifically earmarked for the carriage of letters.

2. If it reaches the merits, affirm the judgment of the California Court of Appeal, and hold that the exceptions in sections 1694 and 1696(c) of the Private Express Statutes permit an employer, in certain circumstances, including the circumstances of this case, to carry union letters dealing with labor relations.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD
Appellee,

and

AMERICAN FEDERATION OF STATE, COUNTY and
MUNICIPAL EMPLOYEES, LOCAL 371, and
WILLIAM H. WILSON, PRESIDENT, LOCAL 371,
Appellees.

On Appeal from the Court of Appeal
of the State of California,
First Appellate District

BRIEF OF THE
AMERICAN FEDERATION OF TEACHERS
AMICUS CURIAE

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AFL-CIO, AMICUS CURIAE.

QUESTION PRESENTED

Whether the Private Express Statutes prohibit the University from carrying in its intercampus mail system unstamped letters from a labor union to University custodial employees.

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INTEREST OF THE AMICUS CURIAE

This brief is filed with the written consent of the parties; the consents lodged with the Clerk of this Court.

The American Federation of Teachers (AFT) AFL-CIO is a public employee union with approximately 650,000 members and over 2,000 locals throughout the United States and the rest of the world. The vast majority of its members work for public employers and collectively bargain with those employers. Many of the AFT locals and its members use the delivery systems of their employers pursuant to state laws and/or collective bargaining agreements to further their

responsibilities under said agreements and various state laws. Without the free use of these systems, the responsibilities of the various locals would be substantially reduced or eliminated.

The American Federation of Teachers is deeply interested in the case at bar, as the decision of this Court herein will have a substantial effect upon all its members and greatly reduce its capacity to carry out its legal and contractual obligations and responsibilities.

The American Federation of Teachers and its members have been involved in extensive litigation throughout the United States concerning the rights of its members and locals. It has filed briefs amicus with this Court, for example in cases such as *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848 (1953); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686 (1954); *Perry Education Association v. Perry Local Education Association*, 460 U.S. 37, 103 S.Ct. 948 (1983) and *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541 (1984).

STATEMENT OF THE CASE

Local 371 of the American Federation of State, County and Municipal Employees (the Union) sought to use the University of California's intercampus internal mail system to distribute collective bargaining organizational literature to the University's custodial employees. The University refused, arguing *inter alia* that to do so would violate the Private Express statutes.

The Union filed an unfair labor practice against the University before the Public Employment Relations Board of the State of California (PERB). After a full evidentiary hearing, the PERB rendered the following findings of fact.

1. The University as an employer commonly disseminated to its employees articles and newsletters which articulated management positions relating to issues of employer-employee relations. These communications were

made *via* the intercampus internal mail system without postage.

2. From time to time the University allowed non-employee organizations to use the University intercampus mail system.

3. There was no evidence that by allowing employee organizations access to the intercampus mail system the University would be disrupted.

4. No financial burden would inure to the University as a result of permitting employee access to the internal mail system of the University.

The Court below affirmed these findings. (*Regents of California v. PERB*, 182 Cal. App. 3d 71, 76, 227 Cal. Rptr. 57, 59 (Cal. App. 1st Dist. 1986)). The Union was allowed to distribute organizational literature based upon the intent of the California legislature to "make collective bargaining a part of the current business of the University." (182 Cal. App. 3d at 79, 227 Cal. Rptr. at 61).

Since the collective bargaining organizational material was deemed part of the University's "current business" it was found to fall within two exceptions and one suspension established by 18 U.S.C. Sec. 1694 and 1696 and 39 C.F.R. Sec. 320.4. As a result, the court below affirmed the PERB order compelling the University to grant the Union access to the intercampus mail service for distribution of its organizational material.

SUMMARY OF ARGUMENT

1. The Private Express Statutes do not prohibit communications from employees or their union representatives because those communications pertain to the current business of the University. In the interest of labor peace unions need an efficient, immediate, and inexpensive method in which to address the membership and discharge the representational duties imposed on the union by statute.

2. The Private Express Statutes do not restrict communications between a union which is not an exclusive agent and the employees it seeks to represent. The California legislature specifically made it the business of the University to create an atmosphere allowing full participation by employees in selecting a union for the purposes of collective bargaining.

3. The Private Hands without compensation exception applies to the case at bar. The Congress intended that no company compete with the Postal Service for profit. There is no profit motive in the current case.

ARGUMENT

The Delivery of Union Mail Related to Collective Bargaining Does Not Violate the Private Express Statutes

A. The Private Express Statutes Do Not Prohibit Communications from Employees or Their Union Representatives

Even though this case does not involve an exclusive bargaining agent, the analysis of a union's use of the employers internal or interoffice mail system must begin by looking at the concept of a union as the representative of its members in collective bargaining with the employer. Internal mail systems of an employer are widely utilized by labor unions in performing the obligations of the union as the exclusive representative of all employees in the bargaining unit. (See, *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, n.11, 103 S.Ct. 948, 958, 47 L.Ed.2d 794 (1983). The rationale for exclusive bargaining agents to have access to the internal mail system is well stated by this Court in *Perry*.

In its role of communicating information to teachers concerning, for example, the collective bargaining agreement and the outcome of grievance procedures, PEA [the exclusive bargaining agent] neither seeks nor requires the endorsement of school administrators. The

very concept of the labor-management relationship requires that the representative union be free to express its independent view on matters within the scope of its representational duties.

Thus when dealing with an exclusive bargaining agent, the employer does not deal directly with its employees on matters concerning the collective bargaining agreement. On such matters such as grievances, requests for pay increases or changes in the working conditions the employer communicates with the employee's agent, the union, who is the exclusive representative of the employees.

To this end the Private Express Statutes were never intended to restrict the free communication between an employer and its employees or visa versa. Those Statutes were premised upon the suspicion that the railroads, whose business after all involved the overland transport of mail for the Post Office, would compete with the actual delivery of mail by the Post Office. The Private Express Statutes were motivated by the perception that the railroad companies in particular must be restricted from attempting to set-up an alternative postal system. On the other hand the drafters of the legislation intended that the railroads have the same ability to communicate with employees as in other businesses. Senator Heyburn made this plain point when he said:

It is not intended that a railroad shall have the right to communicate with its employees on any more liberal terms than a merchant shall have to communicate with his employees. 42 Cong. Rec. 1902 (1908)

And Senator Bacon corroborated this point:

In the operation of railroads it is necessary every day that railroad officials should be communicating up and down the line of road with other officials and employees as to matters connected with the operation of trains or matters relating to maintenance of property. They ought have that opportunity simply as a matter of right

and common justice, and to deny it to them is to subject them to very great inconvenience, if not loss. 42 Cong. Rec. 1902 (1908)

These concerns lead to the "business of the carrier" amendment which appears in 18 U.S.C. 1694 which states as pertinent:

Whoever, having charge or control of any conveyance operating by land, air or water, which regularly performs trips at stated period on any post route, or from one place to another between which the mail is regularly carried, carries, otherwise than in the mail, any letters or packets, except such as relate to . . . *current business of the carrier* . . . shall, except as otherwise provided by law, be fined not more than \$50. (emphasis added)

The Conference Report on the legislation explained what the "business of the carrier" amendment permitted.

[It] permits a common carrier to which a mail coach is attached to transmit by its servants to other stations of its route communications not enclosed in the mail, if such communications are confined to the carrier's business. 43 Cong. Rec. 3789-90 (1909)

It is obvious that the drafters of the Private Express Statutes legislation envisioned unrestricted communication between railroad management and railroad workers on matters pertaining the current business of the carrier which would include road bed conditions, information concerning train disasters, articles left on the train by passengers, and instructions to individual workers as to what duties to perform. (42 Cong. Rec. 1901-06 (1908)) By implication the business of the carrier would relate to wages, hours and working conditions as well.

Moreover, the "business of the carrier" amendment would undoubtedly allow a private citizen to send a letter to railroad management demanding, for instance, that a road-bed be made safe or requesting return of his baggage. In

this vein, a union's demand for additional wood for the stove in the caboose for the comfort of railroad employees is also clearly within the intent of the amendment.

The Private Express Statutes are not for the purpose of restricting communications between an employer and the exclusive agent of his employees or the communication between the exclusive agent, the union, and the principal, the employees. To make the employer-employee dialogue complete the union must be able to communicate with its members to formulate its position with respect to wages, hours, and conditions of employment. Letters to the membership advising of meetings, bargaining positions, and explanations of the labor contract are all part of union's duty to represent the rank and file workers. Such a dialogue clearly relates to the "current business of the carrier." In the eyes of the California legislature such a dialogue is necessary to allow the union to discharge its obligations as exclusive representative of the collective bargaining unit.

B. The Private Express Statutes Do Not Restrict Communications Between a Union Which is Not an Exclusive Agent and the Employees it Seeks to Represent

In California, the State legislature has made it the current business of the University of California to accommodate attempts to organize workers for collective bargaining. The California legislature explicitly stated its intent in the preamble to the collective bargaining legislation here involved:

It is the purpose of this chapter to provide the means by which relations between each higher education employer and its employees may assure that the responsibilities and authorities granted to the separate institutions under the Constitution and by Statute are carried out in an atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them. It is the intent of this chapter to accomplish this purpose by

providing a uniform basis for recognizing the rights of the employees of these systems to full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of representation in their employment relationships with their employers and to select one of such organizations as their exclusive representative. West's Ann.Cal.Gov.Code Section 3560(e)

Pursuant to this statute the Public Employment Relations Board of the State of California held the evidentiary hearing and issued the order compelling the University to accommodate the American Federation of State, County and Municipal Employees, Local 371 attempt to organize custodial workers for bargaining by allowing the union to send organizational material through the intercampus mail system.

The California legislature, the PERB and the California courts have together determined that the union's attempt to organize the custodial employees constitutes the "current business" of the University. As a creature of the California legislature and as an entity subject to the jurisdiction of the PERB and the courts of California, the University must accept the State of California's determination of its business. The California legislature and the PERB have the specialized capacity to determine the nature and importance of collective bargaining within the University system. Lacking the expertise and understanding of the labor relations, the Postal Service cannot change or undermine the determination made by California. The University must follow the dictates of its own legislature and courts.

It makes no difference that the interest of the Union may be at odds with the interest of University management in regard to the collective bargaining issues. Controversies with third parties are legitimate subjects of the "business of the carrier" a narrower interpretation of the "business of the carrier" amendment has been rejected by this Court over seventy years ago in the case of *United States v. Erie Rail-*

road, 235 U.S. 513 (1915). In that case Mr. Griffith, a joint superintendent of the Erie Railroad and Western Union, sent two letters via the railroad's internal mail system to Mr. Osborne, also a joint agent of the railroad and the telegraph company. This letter essentially demanded Western Union to account for revenues owed to the Erie Railroad from telegraph stations in which the railroad had a 25 percent interest in cash receipts. As a result of the two letters the Erie Railroad was indicted for violation of the Private Express Statutes. In affirming the dismissal of the indictments, this Court noted that

The railroad company has an interest in the receipts of the other company [Western Union] and is concerned in their amount and the maintenance and increase of the telegraph business. . . . [W]hile it may be said that there is a railroad business in which the telegraph company has no concern, that is, business distinctly railroad, yet it also so far concerned with the telegraph business as to make its efficient and successful operation of interest to it. To promote such operation was the purpose of the two letters which are the basis of the indictment, and the business comes within the description of the statute and is "current."

235 U.S. at 520.

Similarly, the letters sought to be sent by the Union in this case to attempt to organize the custodial workers are for the purpose of promoting the University's business which is among other things to create an "atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them." West's Ann.Cal.Gov.Code Section 3560(e)

C. The Private Hands Without Compensation Exception Applies

The Senate proceedings show that it was the intent of the legislation to prevent any organization to go into the busi-

ness of delivering mail for profit. Senator McLaurin who supported the amendment stated:

There is not going to be any inroad upon the revenue by permitting a man once in a while to carry to a friend a letter or packet . . . unless he does it for compensation. 42 Cong. Rec. 973 (1908)

Thus, the 18 U.S.C. 1696 provides that it "shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation."

Pursuant to this exception schools and universities deliver a variety of letters in their internal mail systems for non-employee charitable enterprises. Indeed the use of the internal mail systems by outside organizations such as the YMCA, the Cub Scouts, the parochial schools, church organizations, and charitable organizations appears to be widespread and commonly accepted. (*Perry*, at 460 U.S. 46, 103 S.Ct. at 956, 47 L.Ed.2d 794; *Regents of University of California v. PERB*, 182 Cal.App.3d at 76, 227 Cal.Reptr. at 59) In the instant case the University allowed non-employee organizations to use the intercampus mail system and in particular permitted the solicitation of charitable contributions.

The only difference between a membership drive conducted by the union and a membership drive conducted by a charitable organization is that the University management considers the organization of custodial employees to be objectionable. But this motivation is denied to the University by the California legislature. Statute directs the University to create an "atmosphere which permits the fullest participation by employees in the determination of conditions of employment." (West's Ann.Cal.Gov. Code, Section 3560(e) There is no exchange of money or services for the use of the intercampus mail and no consideration.

As for the "private hands" aspect of Section 1696, it is clear from the Senate proceedings that private hands meant any hands other than of the Post Office. The fact that the

private hands in this instance are those of University employees of the State of California is not a distinction which was intended by the drafters.

In the instance of an exclusive bargaining agent, the University would benefit from allowing the union access to the intercampus mail system because to do so would in the eyes of the California legislature preserve labor peace. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, n.11, 103 S.Ct. 948, 958, 47 L.Ed.2d 794 (1983); *Aboud v. Detroit Board of Education*, 432 U.S. 209, 220-21, 224, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 66-70, 95 S.Ct. 977, 43 L.Ed.2d 12 (1975). It is in the interest of labor peace that unions need an efficient, immediate, and inexpensive method in which to address the membership and discharge the representational duties imposed upon the union by state statutes.

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

Respectfully submitted,

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